IN THE

Supreme Court of the United States

October Term, 1975.

No. 75-1516

FIRE OFFICERS UNION, et al.,
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States

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OCTOBER TERM, 1975

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No.

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FIRE OFFICERS UNION, JAMES P. LONGERGAN, LOUIS CAMPANARO, JOHN C. McSLOY, RICHARD J. DARBY, ROBERT E. JONES, MICHAEL J. McCLINN, RICHARD J. SHARP, WILLIAM TROY, JOHN FRIEL, WILLIAM RICHMAN, PETER BLACK, MICHAEL BEAN, J. BRADLEY, B. ZINDELL, D. SMITH and G. GRIFFIN,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA, ET AL.,

Respondents.

—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

—

Petitioners respectfully pray that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Third Circuit which was entered on January 21, 1976.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Third Circuit is unreported; a copy of the said opinion is attached hereto as Appendix A. The Opinion of the United States District Court for the Eastern District of Pennsylvania dated January 7, 1975 is reported at 9 E. P. D. ¶ 9891; a copy of the said opinion and order of January 7, 1975 are attached hereto as Appendix B. The Opinion of the District Court dated March 5, 1975 is reported at 66 F. R. D. 598; a copy of the said Opinion is attached hereto as Appendix C.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1) upon the final Order of the United States Court of Appeals for the Third Circuit entered January 21, 1976.

QUESTIONS PRESENTED.

(1) Whether the District Court properly denied to petitioners the right to intervene on grounds that intervention was untimely and that petitioners had been adequately represented by the existing defendants, where in fact petitioners did not have notice of the inadequacy of defendants' representation or their need to intervene until the very end of the litigation.

(2) Whether the District Court has the Constitutional power under the Tenth and Fourteenth Amendments to ignore duly constituted local civil service systems and state and local anti-discrimination laws and order promotion of "minority" fire officers over "white" fire officers even though the by-passed white fire officers scored higher

on civil service examinations whose validity is not successfully challenged on the record.

(3) Whether the Court of Appeals properly prevented petitioners from intervening for the purpose of Appeal even though the District Court issued orders which on the record were illegal and unconstitutional and which directly and adversely affected petitioners.

(4) Whether the Court of Appeals properly refused to make a determination on the merits as to the legality and constitutionality of the District Court's order promoting minority officers over white officers in derogation of the duly constituted civil service process and local and state anti-discrimination laws.

(5) Whether the District Court abused its equitable powers in ordering promotions on a quota system where: (a) the evidence with respect to the test for the rank of lieutenant was insufficient and of no legal significance; (b) there was no evidence on the record to support a finding that the test for the rank of Captain was discriminatory and (c) where the Court found as a fact that for ranks above Captain, there was insufficient data to determine a statistical significance between the test results of "minority" and "non-minority" candidates.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The constitutional and statutory provisions involved in this case are as follows:

(1) United States Constitution, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(2) Title 43 Purdon's Pennsylvania Statutes Annotated, §§ 955(a) and 955(b)(3); set forth as Appendix D.

(3) Philadelphia Home Rule Charter, Section 10-111; set forth as Appendix E.

(4) Philadelphia Code, Section 9-1103; set forth as Appendix F.

(5) Federal Rules of Civil Procedure, Rule 24(a)(2), Title 28 U. S. C.:

"RULE 24. INTERVENTION.

(a) Intervention of Right. Upon Timely Application anyone shall be permitted to intervene in an action: (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

STATEMENT OF THE CASE.

Petitioners, proposed Intervenors below, are certain named firefighters, officers of the Philadelphia Fire Department and the officers' Union itself.

Respondents, plaintiffs below, are the Commonwealth of Pennsylvania; Club Valiants, Inc., an organization of black Philadelphia firefighters; certain named members of Club Valiants, Inc., and certain named individual black firefighters.

Respondents commenced a Complaint in Equity in the United States District Court for the Eastern District of Pennsylvania on January 31, 1974 alleging that the hiring and promotion practices and policies of the Fire Department of the City of Philadelphia were and are discriminatory. The defendants were Joseph R. Rizzo, Fire Commissioner, and seven other City officials. None of the petitioners were made parties to the action at that time and none sought intervention because they reasonably believed that the existing defendants were protecting their interests. Petitioners are only concerned with the District Court's orders *as they apply to promotions*, to the rank of lieutenant and above and not as to hiring.

In or about November, 1974, respondents filed an amended complaint to which the existing defendants filed a motion to dismiss. As of the date of the final hearing, the District Court had not ruled on the motion to dismiss and defendants had not filed an answer to the amended complaint.

Respondents moved for a preliminary injunction solely respecting hiring and the Court took testimony on that issue for a period of eight days in July, 1974. During the hearings, respondents advised the Court that no evidence would be presented, and respondents were not seeking a preliminary injunction with respect to, promotions.

Consistent with that, respondents offered no testimony and did not introduce any documents concerning their alleged claim of discriminatory promotion practices and policies. Throughout this period of time, petitioners reasonably believed and the defendants did nothing to dispel that belief, that the existing defendants were protecting and promoting their interests in defense of the claims regarding promotions.

On Friday, December 27, 1974, petitioners' counsel discovered that the existing defendants had agreed with respondents to submit an order to the court permitting promotions effective December 30, 1974, which promotions called for the by-passing of petitioners and the promotion of certain others who had received lower scores on the promotion examinations than petitioners. That information came as a surprise to counsel for only one day before counsel had been advised by defendants' counsel that no action would be taken in the area of promotions and the status quo would be maintained. On that date, the District Court, the Honorable Louis Bechtle, did issue an order consistent with the understanding of respondents and defendants. A copy of the Order of December 27, 1974 is attached hereto as Appendix G. At the time that order was entered, no evidence of any kind had been presented to the Court on the issue of promotions and there was no basis for requiring promotions to be made other than in the normal and usual manner. After consultation with Judge Bechtle, certain of the petitioners filed a Motion to Intervene on December 30, 1974 and the remaining petitioners filed a Notice of Motion to Intervene on December 31, 1974, petitioners having discovered that the existing defendants were no longer protecting their interests and that those interests were in direct conflict with those of the defendants. By agreement, respondents and

defendants were given an extension to January 22, 1975 to file their responses to petitioners' motion to intervene.

Notwithstanding the filing of the motions to intervene and the allegation that the existing defendants were not protecting petitioners' interests, Judge Bechtle met with counsel for respondents and existing defendants on January 7, 1975 for the purpose of holding a final hearing. Counsel for petitioners were not notified of the hearing, but upon learning of the hearing and requesting attendance, were specifically precluded from the hearing by the Court.

Prior to January 7, 1975 hearing, no evidence had been introduced into the record of this case concerning the issue of promotions. The first time any such evidence was placed on the record was on January 7, 1975 (*after* petitioners' Motion to Intervene and Notice of Motion to Intervene) in the form of documentation as to alleged discriminatory promotional practices and policies. No testimony was taken at that hearing and the documents introduced by respondents were admitted without objection by the existing defendants. Respondents' expert witnesses were not subjected to cross-examination on their opinions. An extensive order was entered on January 7, 1975 involving the hiring and promotion of Philadelphia firemen on a minority quota system.

Petitioners filed timely appeals to the Court of Appeals both as to the District Court's substantive order of December 27, 1974 and January 7, 1975 and as to the District Court's order entered March 5, 1975 denying intervention to petitioners.

The Court of Appeals, in an Opinion and Order dated January 21, 1976, (1) affirmed the District Court's denial of intervention, holding that petitioners' attempt to intervene was improper in that their interests had been adequately represented by the defendant City and therefore

their motions were untimely; (2) dismissed petitioners' appeal of the District Court's substantive orders on the ground that petitioners were not a party to the action.

Petitioners have therefore been denied their right to be heard in any forum, on the issue of the legality and constitutionality of a discriminatory promotion order being implemented to their detriment. The District Court, with notice of Petitioners' intention to intervene, nevertheless went forward and directly deprived Petitioners their promotions in the Philadelphia Fire Department. Furthermore, the Court never even permitted petitioners to present testimony to prove that their intervention was in fact timely, that they were misled by the existing defendants and that the individual petitioners could not have possibly known who would be adversely affected, if any one, until the District Court's order imposing a quota on promotions was entered.

REASONS FOR GRANTING THE WRIT.

I. Refusal of Intervention, Without a Hearing, on the Disputed Question of Inadequate Representation and Timeliness Was Improper, and Contra to This Court's Rulings.

As shown in the Statement of the Case, the District Court, without any evidentiary hearing, or oral argument, determined the basic disputed issues that petitioners had been adequately represented by their employer, and that they had waited too long to intervene. In addition, even assuming *arguendo* that the individual petitioners' union and some of its officials may have had some knowledge that quota promotions were possible, there is no proof, nor allegation, that *all* petitioners had such knowledge. Further, until the District Court, in fact, issued its order requiring certain "minority" promotions, none of the individual petitioners knew or could have known whether *they* would be adversely affected by an Order of the Court, since until the City, (with the Court's approval) actually decided to make promotions and determined who and how many were to be promoted, no individual petitioner could know if he was in position to intervene or whether his right to promotion was affected, and none had standing to then intervene.[1]

Nor could Petitioners know that the Court would not utilize the logical procedures spelled out in *Harold Franks, et al. v. Bowman Transportation, et al.*, 44 L. W. 4356, 4363 (1976); i.e., a determination first of the general issue

1. Had the Court ordered either party to send a simply letter to all persons on the promotion lists advising them of the dangers of the litigation to their promotion possibilities, it is possible this appeal would never have been necessary. Apparently, however, neither the parties nor the Court ever considered the rights of the non-minority fire officers in their deliberations.

of discrimination and then a determination as to the individual plaintiff's right to a promotion. Had the *Franks* procedure been utilized, the Petitioners could have then intervened to show their own right to promotion as opposed to that of the individual members of the "minority class". However, the District Court, with the acquiescence of the parties, suddenly without a trial and solely on stipulated evidence (and even prior to the official introduction of that evidence into the record) found discrimination and ordered certain individuals promoted.

On the issue of whether the intervenors' employer, the City of Philadelphia, adequately represented their interests, the Court misapplied *Trbovich v. United Mine Workers,* 404 U. S. 528 (1972) and without hearing petitioners' evidence on the matter merely questioned whether the City's representation of the City's and the employees *mutual* interest *was* inadequate and not whether it *may* have been inadequate. See *Hodgson v. United Mine Workers,* 473 F. 2d 118, 124 (D. C. Cir. 1972). It further failed to consider the admonishment in the *Trbovich* case that the city's interest and the interest in its employees "may not always dictate precisely the same approach to the conduct of litigation." 404 U. S. at 539.

Since the petitioners were not adequately represented by their employer, whose interest, both economically and politically, on its face, may well have become inimicable to that of the individual petitioners, and since petitioners were, in fact, misled into a false sense of security by their employer purporting to represent their interests, the Court's conclusion that Petitioners' attempt to intervene was untimely is also without merit.

In *Hodgson v. United Mine Workers, supra,* that Court's analysis of the issue of timeliness is quite relevant. In that case proposed intervenors sought to participate

in the remedial, and if necessary, the appellate stages of the case. The Court held that the amount of time elapsed since litigation was commenced was not controlling:

> "Timeliness presents no automatic barrier to intervention in post-judgment proceedings where substantial problems in formulating relief remain to be resolved . . . intervention may be allowed [even] after a final decree when it is necessary to preserve some right which cannot otherwise be protected." 473 F. 2d at 129.
>
> • • •
>
> "It can hardly be gainsaid that appellants have rights which could be irrevocably lost were intervention not permitted at this time."

Therefore, petitioners' promotional rights were denied to them, as well as any prior notice or an opportunity to intervene to protect their rights, contrary to law, and contrary to the basic requirements of due process.

II. Intervention Should Have Been Allowed to Show That Plaintiffs Were Not the Best Qualified and That the Remedy Was Improper and Illegal.

The order of the Court below required the promotion out of turn of named individual firemen. Nothing was ever introduced into the record at any time to show whether these particular blacks and hispanics were, in fact, discriminated against. At best, all that was shown was that certain minorities *in general* did not do as well as "white" applicants in the promotional tests and that these tests may not have been job related. There is no evidence in the record whatsoever to show whether the minority firemen actually given preferential promotions

had, themselves been discriminated against by these promotional tests, whether had they been given "valid tests" they would have qualified for promotion and whether they were more qualified or even as qualified as those "non-minority" members who were arbitrarily passed over.

The two-tier approach utilized in the case of *Franks, et al. v. Bowman Transportation Co., Inc., supra* where the general issue of discrimination was first decided and then the issue of whether a particular member of the class allegedly discriminated against was himself in fact discriminated against, was not utilized in the instant case. Here, the District Court did not require the parties to show that any of the minority members given a preferential promotion were, in fact, the victims of discrimination. It merely assumed this to be true and promoted them out of turn.

Since the employer-city failed to question this automatic promotion for specified "minorities", we respectfully submit that non-minority fire officers who were pushed back to make room for the preferred few should have been given the opportunity to show that given any valid test, or standard, they were more qualified for promotion than those jumped over them.

Even assuming, *arguendo,* that the Court validly refused intervention on the theory that the record was closed as to the issue of discrimination in promotions in general, the issue of whether the individual plaintiffs were entitled to preferential treatment was never presented to the Court. On that issue, the Petitioners had a vital interest at stake, and the existing defendants never represented that interest. *Cascade National Gas Corporation v. El Passo National Gas Co.,* 386 U. S. 129 (1967).

III. At a Minimum, Intervention Should Have Been Allowed for the Purpose of Appeal.

Even assuming, *arguendo,* that none of the petitioners should have been permitted to intervene for the purpose of protecting their basic rights and interest at the trial stage, they should have at least been permitted to intervene for purposes of raising fundamental constitutional and fact issues on appeal, issues which are evidenced from the face of the record itself. *Auto Workers v. Scofield,* 382 U. S. 205 (1965); *American B. Shoe and Foundry Co., v. Interborough R. T. Co.,* 3 F. R. D. 162 (S. D. N. Y. 1942); *Hurd v. Illinois Bell Bel. Co.,* 234 F. 2d 942 (7th Cir. 1956); *Hodgson v. United Mine Workers, supra.*

It was evident that neither party of record would appeal from the decision of the District Court. Fundamental constitutional errors, and fundamental abuse of discretion, appearing on the face of the existing record itself, could not and would not be challenged unless Petitioners were permitted to intervene. This intervention would have caused no delay, but would have prevented the court from acting beyond the scope of its authority and beyond the mandate of the evidence. If intervention is not permitted to raise these issues, the proposed intervenors will have been deprived of their ability to even question that which has deprived them of their basic rights.

Following in limited detail are some of the errors committed by the District Court, and acquiessed in by the existing parties. *These matters were fully argued before the Circuit Court,* which, although having them before it, refused to consider them.

A. The Court Wrongfully Usurped the Authority of the Philadelphia Civil Service Commission.

The District Court found, *inter alia,* that the City of Philadelphia (a) "made reasonable efforts to eliminate any historical vestige or appearance of social discrimination which may have arisen out of any past discriminatory practices." (b) treatment of minorities has been and continues to be a major concern of the City. (c) the City has exhibited the "highest integrity and forthrightness of action and purpose" in attempting to eliminate discrimination," (d) has made reasonable good faith efforts on a voluntary basis to eliminate discrimination, and (e) any discrimination at this time is unintentional (A. 1676-1678). Yet, the District Court, on the one hand, praised the City in its efforts to eliminate discrimination and then on the other hand, stripped the City and its Civil Service Commission of its legal authority to carry out the Court's mandate to continue the task.

The District Court's order, on its face,

(a) Permits plaintiffs' representatives to see and evaluate the future *actual* promotional tests before they are in fact administered, and leaves open the possibility that plaintiffs' representatives may participate in the actual construction of these tests.

(b) It requires future promotions to be cleared through the Court, and gives the Court authority to give preference in future promotions to Blacks and Hispanics who have failed the prior promotional tests.

(c) It ordered the promotion of a "white" candidate from an expired list and over other "white" candidates without any reason therefore whatsoever.[2]

This is, we respectfully submit, an usurption of the rights and duties of the City and the local authorities, contrary to the rationale in *Rizzo v. Goode,* 96 S. Ct. 598 (1976), and contrary to the decision of the Court of Appeals for the 4th Circuit (*Harper v. Kloster,* 480 F. 2d 1134 (1973)) and the decision of the Circuit Court of Appeals for the 2nd Circuit (*Kirkland v. the New York State Department of Correctional Services*), 520 F. 2d 420 (1975)).

B. The Court Ordered Preferential Treatment for Spanish Surnamed Americans Without Any Supportive Evidence or Findings Whatsoever.

The Complaint in the instant case was brought by certain Black plaintiffs. The complaint and amended Complaint only dealt with alleged discrimination against Blacks. There was no evidence in the record whatsoever concerning any other minority groups, including Hispanics. However, the District Court, in its orders gave preferential promotional treatment to both Blacks and Spanish Surnamed Americans, and at least one such Hispanic was promoted out of turn by these Orders. No definition was ever given for "qualified minorities," the touchstone of the Court's order.

C. The Court Ordered "Quota" Promotions Without Any Evidence of Discrimination Against Those Persons Given Such Preferential Treatment.

A number of Black and Hispanic fire officers were ordered to be promoted ahead of other fire officers on the

2. In hiring, the Court went so far as to giving "minority applicants who failed the prior tests 7 extra points in future tests, and created a special lay "appeal panel" for blacks, while whites were required to use the existing Civil Service Appeal structure.

sole basis of their race, color or national origins. There was no showing nor was any evidence introduced whatsoever other than that some of these "preferred" candidates were members of a group who were given an allegedly "unfair" test. The issue of whether or not the test involved was "unfair" to other minority group members who were denied a quota preference was not considered by the Court below, nor was the issue of comparative qualification between those promoted and those refused promotion.[3]

D. There Was No Evidence Presented Warranting the Court's Findings and Conclusions That the Promotional Tests for Lieutenant, Captain, Assistant Chief, Deputy Chief and Batallion Chief Were Invalid.

(a) *Lieutenant's Test:* In its Order of January 7, 1975, the Court found that the Lieutenant's examination was discriminatory based upon a passing rate the Court concluded demonstrated a disparate impact on minority candidates. The Court's finding was bottomed upon the written reports of plaintiffs' two alleged experts. The evidence presented, unchallenged by cross-examination, was insufficient to sustain the finding. As just one example, plaintiffs' alleged expert found that a black-white effective pass ratio of 1:22 to 1 was statistically significant but a white-black effective pass ratio of 1:20 to 1 was not statistically significant (1975a-1976a). No basis for that conclusion was anywhere stated in the expert's report.

(b) *Captain's Test:* 141 non-Blacks and 18 Blacks took this test. 65.2% of the white's passed and 27.8% of

3. For example, the passing score was lowered by agreement of the parties to permit one "minority" fireman to "pass" a test he failed.

the blacks passed. (The effective passing rate on the prior Captain's examination was 49.7% white to 20.8% black.) The Court found this "statistically significant: but no basis for this conclusion was set forth (1684a). Further, Plaintiffs' own expert concluded that, with regard to this test . . ." care must be taken in deriving ultimate conclusions because of the small number of blacks who took the test." (1620a).

(c) *Battalion Chief's Test:* Here 84 whites and 2 blacks passed the test. Percentage-wise, a higher percentage of blacks passed the test than whites (1621a). Here, the Court found it impossible to do a statistical analysis of the effect of the examination, (1685a & 1686a) but all "minority members" on the promotion list were ordered promoted, including one black where it was necessary to lower the passing score to accommodate him.

(d) *Deputy Chief's Test:* Here 34 white and 1 black passed the test (the blacks passing rate was higher than the white) (1621a). Although Plaintiffs made no request for relief in this category, and although no new test was ordered by the Court, the Court's order *required* a black to be promoted over higher scoring whites. Here, again the Court found it impossible to make any findings based on the statistics of this test (1685a-1686a).

(e) *Assistant Chief:* Although no relief was requested or granted in this category, the Court retained jurisdiction over these promotions.

At no time was any evidence received or consideration given as to the effect on the morale of the fire department, or the effect on those arbitrarily passed over for promotion by the quota promotions.

E. Quota Preferential Promotions Ordered by the Court Violated Valid and Subsisting Laws and City Ordinances.

Pennsylvania State Law, (Pennsylvania Human Relations Act, 43 P. S. § 951 et seq.). Section 10-111 of the Philadelphia Home Rule Charter, and Section 9-1103 (2) of the Philadelphia Code all prohibit discrimination in employment and specifically prohibit quotas in hiring and promotions. We respectfully submit that when a state enacts legislation pursuant to its reserved powers under the Tenth Amendment to the U. S. Constitution and when such legislation conforms to and is enacted to further the dictates of the Fourteenth Amendment, a Court may *not* ignore such legislation, substitute its wisdom for that of the legislature and issue orders contrary to such legislation. The Court below prior to issuing an order contrary to state laws, must directly address itself to such state laws and affirmatively find them to be invalid, it cannot merely ignore them. *Munn v. Illinois*, 94 U. S. 113, 123 (1876). Also see *Hughes v. Superior Court*, 339 U. S. 460 (1950); *Shapiro v. Thompson*, 394 U. S. 618, 641 (1969).

We therefore submit that the District Court, in formulating its orders, was bound to honor the State's requirement of strict nondiscrimination, and not supplement it with its own formulation of "benign" discrimination.

F. The Orders of the Court Below Violated the Fourteenth Amendment to the U. S. Constitution.

The basic Constitutional issue of Racial Quotas has never been decided by this Court (see *DeFunis v. Odegaard*, 416 U. S. 312, 40 L. Ed. 169 (1974)).

Not only do the orders of the District Court require the City to promote a minimum percentage of "qualified minority" persons, but more significantly, it places a *maximum* on the percentage of "white fireman" who may be promoted in any given group. Therefore, the *instant* case is distinguishable from any case in which a given percentage of minorities were required to be accepted by an organization without a commensurate restriction in the number of whites to be accepted. The nature of promotions in the Philadelphia Fire Department is such that only a certain number of persons can be promoted at any given time. Thus a quota favoring certain "minorities" necessarily means a quota discriminating against other groups. This distinction was recognized in *Contractor's Association of Easton Penna. v. Sec'y of Labor*, 442 Fed. 159 (3rd Cir. 1971), cert. den. 404 U. S. 854 where the Circuit Court found that "Contractors would commit to the specific employment goals without adverse impact on the existing labor force". Quite to the contrary, in the instant case, promotion of "minority" firemen on the basis of race directly and prejudicially affects the promotion of others solely on the basis they are not members of that particular minority. Such discriminatory treatment, we respectfully submit, cannot withstand the requirements of Equal Protection under the Fourteenth Amendment to the United States Constitution. Also see *DeFunis v. Odegaard, supra* (dissenting opinion); *Shapiro v. Thompson, supra.*

CONCLUSION.

For the reasons set forth above, we respectfully submit that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: April 19, 1976.

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 75-1236 and 75-1332

COMMONWEALTH OF PENNSYLVANIA, CLUB VALIANTS, INC., RONALD C. LEWIS, CHARLES G. HENDRICKS, ROBERT E. DOBSON, JOSEPH SAWYER, GEORGE T. ROBINSON, NORMAN MARTIN, RONALD ARRINGTON, SYLVESTER SIBERT, STEPHEN KERRIN, RONALD BYNG, FIELDING VAUGHN, RUDOLPH McKENNEY, IRA TABORNE, THOMAS LONEY, TYRONE MURRAY, JONATHAN CLARKE, LAWRENCE JONES, JOSEPH BLACKSHEAR, BENJAMIN ROBINSON, CHARLES A. WOODS

v.

JOSEPH R. RIZZO, Fire Commissioner, HILLEL LEVINSON, Managing Director, FOSTER B. ROSER, Personnel Director, LEWIS TAYLOR, Personnel Director, CLARENCE M. FARMER, Chairman, Philadelphia Commission on Human Relations, FRANK L. RIZZO, Mayor, GEORGE BUCHER, LEONARD L. ETTINGER, and HARRISON J. TRAPP, Civil Service Commissioners, CITY OF PHILADELPHIA Individually and in their official capacities.

FIRE OFFICERS UNION, JAMES P. LONGERGAN, LOUIS COMPANARO, JOHN C. McSLOY, RICHARD J. DARBY, ROBERT E. JONES, MICHAEL J. McCLINN, RICHARD J. SHARP, WILLIAM TROY, JOHN FRIEL, WILLIAM RICHMAN, PETER BLACK, MICHAEL BEAN, J. BRADLEY, B. ZINDELL, D. SMITH and G. GRIFFIN,

Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D. C. Civil Action No. 74-258)

Argued October 14, 1975
Before: ALDISERT, FORMAN and ADAMS, *Circuit Judges.*

Opinion of the Court.

(Filed January 21, 1976)

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ALDISERT, *Circuit judge.*

The Fire Officers Union and several individual firemen and officers filed two appeals, here consolidated, from a proceeding which challenged the employment practices of the Philadelphia Fire Department as racially discriminatory. No. 75-1332 seeks review of the district court's denial of appellants' motion to intervene of right pursuant to F. R. Civ. P. 24(a)(2). No. 75-1236 seeks review on the merits of the district court's orders requiring insti-

tution of new written promotion examinations and imposing interim minority promotion quotas. We affirm the denial of intervention at No. 75-1332 on the ground that the district court did not abuse its discretion in concluding that appellants' motions to intervene were untimely. We dismiss the appeal at No. 75-1236 on the ground that only a party of record in the district court may appeal.

I.

The genesis of these proceedings was a class action complaint filed January 31, 1974, by Club Valiants, Inc., an organization of black Philadelphia firefighters, by the Commonwealth of Pennsylvania, and by certain individual black firefighters, alleging that the employment practices of the Philadelphia Fire Department were racially discriminatory in violation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e et seq., the Civil Rights Acts of 1870 and 1871, 42 U. S. C. §§ 1981 and 1983, and the Thirteenth and Fourteenth Amendments to the United States Constitution. The complaint named as defendants the Mayor and Fire Commissioner of Philadelphia, as well as various other city officials responsible for formulation and implementation of the Fire Department's employment practices. Plaintiffs requested extensive equitable relief, including the institution of interim hiring and promotion quotas as remedies for discrimination.

Extensive pretrial activity followed. After discovery and the disposition of several motions, the district court held an evidentiary hearing on plaintiffs' motion for a preliminary injunction with respect to hiring. On July 26, 1974—after eight days of testimony—the court granted the motion finding that hiring discrimination existed and that its continuance would result in irreparable harm to the plaintiffs. The court ordered defendants to develop

racially neutral selection procedures; until such procedures were implemented, the defendants were preliminarily enjoined from hiring any new firefighters unless the hiring was from the current eligibility list in the ratio of one qualified minority for every two qualified whites. On August 5 the court entered an order directing that all discovery be completed by November 1, establishing dates for filing of pretrial memoranda and exchange of documents, and setting December 2 as the date for final hearing.

Discovery was concluded in early November. Later that month plaintiff filed their pretrial memorandum, but the final hearing scheduled for December 2 was continued and a series of settlement conferences were held instead. The parties resolved the claims of the individual plaintiffs but other issues, including the question of promotions, could not be resolved. During the settlement conferences, the defendants informed the court that, because of a new fourth platoon in the Philadelphia Fire Department, a number of promotions had to be made before the end of the year. Plaintiffs filed a motion for an injunction *pendente lite* requesting that these promotions be enjoined unless a certain percentage of those promoted were minorities. On December 27, 1974, the district court granted that motion and entered an order specifying the racial composition of promotions to be made on December 30: 1 of 5 promoted to Deputy Chief would be a qualified minority; 2 of 15 promoted to Battalion Chief would be qualified minorities; 3 of 15 promoted to Captain would be qualified minorities; and 8 of 53 promoted to Lieutenant would be qualified minorities. The promotions were made as ordered. The final hearing was rescheduled for January 7, 1975.

On December 30 several individual white firemen on the Lieutenant promotion list moved to intervene. The Fire Officers Union and several individual officers on vari-

ous promotions lists moved to intervene on January 6. Local Rule 36 of the Eastern District of Pennsylvania requires notice of five business days for all contested motions. Because the proposed intervenors' original motions did not conform to that rule, they filed a joint amended motion on January 23 seeking intervention of right pursuant to F. R. Civ. P. 24(a).

The final hearing took place as scheduled on January 7. Individual claims were formally settled by stipulation. The parties also stipulated to the introduction of evidence and to the testimony certain witnesses would give if called. The court made findings of fact and conclusions of law and entered a final order disposing of all unresolved issues. The final order provided relief in two primary areas, hiring and promotion. Defendants were ordered to develop and implement valid, racially neutral tests and procedures for hiring and promotion. In the interim, the court enjoined defendants from hiring or promoting unless certain quotas were fulfilled. New firefighters were to be hired from the current eligibility list in the ratio of one qualified minority for every two qualified whites. At least 15 per cent of the firefighters promoted to the ranks of Lieutenant and Captain were to be eligible minorities. Two qualified minorities were to be promoted to Batallion Chief when promotions to that rank were next made; one qualified minority was to be promoted to Deputy Chief when promotions to that rank were next made. The final order also treated the issue of assignments within the Fire Department; awarded costs and attorneys fees; and ordered periodic reporting by the defendants detailing the implementation of the order.

On February 5, the proposed intervenors filed an appeal on the merits from the promotion aspects of the district court's orders (No. 75-1236), fearing that their appeal

might be untimely if they waited for the court to rule on their intervention motions. On March 5 the court denied their motions; the proposed intervenors filed their appeal from that denial on April 2 (No. 75-1332). The two appeals have been consolidated.

II.

Appellants have asserted a right to intervene under F. R. Civ. P. 24(a)(2). "When an absolute right to intervene in a lawsuit is claimed, and the claim is rejected, the order denying intervention is considered final and appealable." *Philadelphia Electric Co. v. Westinghouse Electric Corp.*, 308 F. 2d 856, 859 (3d Cir. 1962), *cert. denied*, 372 U. S. 936 (1963). We do not follow the older rule which made appealability turn on whether the appellant had, in fact, a right to intervene. "Since [such a rule] makes appealability turn on the merits, it is not a very effective or useful limitation of appellate jurisdiction; the propriety of the denial by the district judge must be examined before the appellate court knows whether it has jurisdiction, and the only consequence of the restriction on appealability is that on finding the district judge was right, it will dismiss the appeal rather than affirm." *Levin v. Ruby Trading Corp.*, 333 F. 2d 592, 594 (2d Cir. 1964) (Friendly, J.) (quoted in 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1923, at 627 (1972)). It is sufficient that intervention of right was sought and denied to render the denial appealable.

Rule 24(a)(2) F. R. Civ. P. provides:

> (a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the

disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The question whether appellants were entitled to intervene of right depended on their satisfying the district court in three respects: first, that they had a sufficient interest in the matter, and that their interest would be affected by the disposition; second, that their interest was not adequately represented by the existing parties; and third, that their application was timely. Although appellees have argued to the contrary (Appellees' Brief at 28), we may assume that appellants satisfied the first test, the interest test. Appellants assert that they also satisfied the other tests: "Appellants submit that they acted timely, that their interests were not being represented by defendants and that they, therefore, had an absolute right to intervene." (Appellants' Brief at 6-7).

The principal thrust of the argument before this court —both by brief and oral argument—was that appellants delayed filing their intervention motion because they were lulled into non-action by misrepresentations by counsel for the public defendants, officers of the City of Philadelphia, that the case was being vigorously defended when, in fact, it was not. Appellants argue, in effect, that any tardiness on their part ought to be excused because it resulted from deception practiced upon them by defendants' counsel. Thus, although the ultimate issue in this appeal is the timeliness of the intervention motion, this court should address the question whether defendants' counsel misrepresented the adequacy and vigor of the defense conducted. If they did, then that fact ought to be considered in evaluating the timeliness of appellants' intervention motion.

A.

Appellants contest the district court's conclusion that "the rights of all firemen and officers to promotion within the Fire Department were adequately and fully protected by the City of Philadelphia and the Philadelphia Fire Department throughout the course of this litigation." (App. 1780a). Distilled to its essence, it is the appellants' contention that they reasonably believed the existing defendants were vigorously defending their interests in the promotion aspects of the case until December 27; on that date, the defendants agreed to the order imposing promotion quotas and the appellants suddenly realized that their interests were not being defended. Appellants moved quickly to intervene, their argument continues, but the defendants—who had assured appellants that no agreements had been reached as to promotions—promptly settled the case on January 7, the settlement resulting in promotion quotas bypassing certain appellants. Appellants contend that defendants abandoned their interests, at least as of December 27. We disagree.

Initially, we note that, notwithstanding the liberalizing 1966 amendment of Rule 24(a), the burden of establishing inadequate representation—though the burden "should be treated as minimal"—remains on the proposed intervenor. *Trbovich v. United Mine Workers*, 404 U. S. 528, 538 n. 10 (1972). Furthermore, a presumption of adequate representation generally arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee. 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1909, at 528-29 (1972); *see Sam Fox Publishing Co. v. United States*, 366 U. S. 683, 689 (1961) (dictum). All defendants here fit that mold. Where official policies and practices are challenged, it seems unlikely that anyone

could be better situated to defend than the governmental department involved and its officers.

Our independent examination of the record does not support appellants' contention that defendants agreed to the injunction *pendente lite* of December 27, 1974, nor have appellants cited any record references where this appears. The district court did not characterize the injunction as a consent decree: "On December 27, 1974, upon consideration of plaintiffs' motion for an injunction *pendente lite*, the Court entered an Order specifying the racial composition of promotions to be made by the Fire Department on December 30, 1974." (App. 1775a). Even if the junction had been characterized as a consent decree, inadequate representation would not be established *ipso facto;* any case, even the most vigorously defended, may culminate in a consent decree. As the Seventh Circuit has observed, a consent decree may be simply "the inescapable legal consequence of application of fundamental law to [the] facts. That [intervenors] would have been less prone to agree to the facts and would have taken a different view of the applicable law does not mean that the [defendants] did not adequately represent their interests in the litigation." *United States v. Board of School Commissioners,* 466 F. 2d 573, 575 (7th Cir. 1972), *cert. denied,* 410 U. S. 909 (1973).

Appellants' additional contention, pressed vigorously at oral argument, that defendants' counsel lulled them into a belief that the final hearing was to be contested when in fact it was not, requires inquiry into the adversary nature *vel non* of the final hearing. Examination of the record on this point also lends no support to appellants. There was agreement as to the procedures governing reception of evidence, but not as to the substantive results of the hearing. Thus, on January 7, the district court commented:

> . . . The record should note that there has been a hearing on a portion of the case and the court has rendered its decision on a portion of the case which was filed by order in August of 1974. The remaining feature of the case having to do with promction has been the subject of a series of submissions by counsel of proposed stipulations and exhibits and agreed testimony, that is, agreed to the extent that the parties have agreed that if certain persons did appear they in fact would testify as outlined in certain exhibits.

(App. 1741a).

Moreover, another comment of the district court on the same day discloses no question in its mind concerning the vigor of advocacy on both sides:

> THE COURT: I would also like to make clear at this time that as far as the court is concerned, aside from one or two what the court considered to be minor differences and minor misunderstandings, primarily both sides of this case have advanced their clients' cause with vigor and in the highest keeping of the legal profession as practiced in the United States courts . . . .

(App. 1753a).

We therefore reject appellants' contention that the lateness of their intervention motion ought to be excused because of misrepresentations concerning the adequacy and vigor of opposition to the promotion aspects of the December 27 injunction and the January 7 final order. The record demonstrates that both the injunction and the order emanated from adversary litigation. We also reject any implied contention that representation becomes inadequate whenever the representative is unsuccessful in urging a position: adequate representation may or may not be successful representation.

B.

NAACP v. New York, 413 U. S. 345, 365-66 (1973), explained the timeliness criterion of Rule 24:

> Whether intervention be claimed of right or as permissive, it is at once apparent, from the initial words of both Rule 24(a) and Rule 24(b), that the application must be "timely." If it is untimely, intervention must be denied. Thus, the court where the action is pending must first be satisfied as to timeliness. Although the point to which the suit has progressed is one factor in the determination of timeliness, it is not solely dispositive. Timeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review.

(Footnotes omitted.)

The Eighth Circuit recently summarized several factors which ought to inform the district court's discretion in determining whether a motion to intervene is timely under "all the circumstances":

> [1] [H]ow far the proceedings have gone when the movant seeks to intervene, NAACP v. New York, *supra*, 413 U. S. at 367-368, 93 S. Ct. 2591; Iowa State University Research Foundation v. Honeywell, Inc., 459 F. 2d 447, 449 (8th Cir. 1972), [2] prejudice which resultant delay might cause to other parties, Diaz v. Southern Drilling Corp., 427 F. 2d 1118, 1125-1126 (5th Cir.), cert. denied, 400 U. S. 878, 91 S. Ct. 118, 27 L. Ed. 2d 115 (1970); Kozak v. Wells, 278 F. 2d [104] at 109 [(8th Cir. 1960)], and [3] the reason for the delay, Iowa State University Research Foundation v. Honeywell, Inc., *supra*, 459 F. 2d at 449.

Nevilles v. EEOC, 511 F. 2d 303, 305 (8th Cir. 1975). These three factors provide a useful framework for our review of the district court's exercise of discretion in denying intervention as untimely.

When appellants filed their third and only procedurally proper motion on January 23, the proceedings had already been concluded and the final order of January 7 entered. Furthermore, as the district court commented in its memorandum and order denying intervention:

> [T]he first petition for leave to intervene was filed three days after the injunction *pendente lite* was granted and seven days prior to the entry of the Court's final Order. The second application for intervention was made the day before the final Order was entered in this case. It must also be noted that the motions for intervention were filed almost a full year after the filing of the complaint and five months after the hearing and decision on plaintiffs' motion for a preliminary injunction.

(App. 1778a).

With regard to the prejudice which the resultant delay might cause to other parties, the district court commented:

> To allow intervention at this stage of the case would result in serious prejudice to the rights of the plaintiffs and the Philadelphia Fire Department. Extensive discovery has been undertaken and completed, all critical issues have been resolved, and a final Order has been entered. The interest in basic fairness to the parties and the expeditious administration of justice mandates the denial of the motion to intervene.

(App. 1780a).

Appellants seem to assert two reasons, somewhat inconsistent, for their delay in moving to intervene. First, they argue that, until December 27, they reasonably believed that their interests were being adequately represented. Second, they contend that, until December 27, they reasonably believed that their interests were not even implicated in the proceedings because they understood that the matter of promotions was to remain in *status quo*. In either event, they point out that they moved promptly to intervene after December 27.

Having already decided the issue of adequacy of representation adversely to appellants, we need not rehearse that matter here. With regard to appellants' misunderstanding about the promotion aspects of the case, we note that the complaint, by its terms, addressed the whole spectrum of employment practices in the Fire Department and that the litigation engendered interest and publicity in Philadelphia. Even if we might justify tardy intervention in cases where the litigation or its progress was concealed from potential intervenors, we find no such concealment here. In concluding the motions to intervene were untimely, the district court stated:

> [T]he intervenors cannot reasonably claim that they were unaware of the filing of the complaint, the granting of the preliminary injunction, or the pendency of the proceedings that ultimately culminated in the entry of the final Order on January 7, 1975. There was continuous and extensive media coverage of the nature and scope of the instant litigation, including, but not limited to, newspaper articles appearing in the Philadelphia Inquirer, Bulletin and Daily News. In February, 1974, copies of the complaint in this action were circulated by departmental mail to fire stations throughout Philadelphia. An affidavit submitted by Ronald Lewis, the past president of the Club Valiants, Inc., (a plaintiff herein) shows that discussions were held with individual members of the Fire Officers Union concerning the likelihood of suit and the nature of the relief sought.
>
> Petitioners had every opportunity to intervene in this law suit. The nature of the relief sought and granted in connection with the plaintiffs' motion for preliminary injunction should have alerted the petitioners to the likely necessity for intervention. The applicants failed to exercise their right to intervene in this action. The Court concludes, therefore, that the applications for intervention are untimely.

(App. 1778-79a). We find no abuse of discretion in that conclusion. Accordingly, we affirm the denial of intervention at No. 75-1332.

II.

Appellants have appealed the merits of the district court's orders—insofar as promotions were involved in No. 75-1236. The general rule is that only a party of record in the district court may appeal from the judgment of that court. *Credits Commutation Co. v. United States,* 177 U. S. 311 (1900); *Payne v. Niles,* 61 U. S. (20 How.) 219 (1857); 9 J. Moore & B. Ward, Federal Practice ¶ 203.06, at 715 (2d ed. 1975).

> [I]t has long been the law as settled by this court that "no person can bring a writ of error [an appeal is not different] to reverse a judgment who is not a party or privy to the record," *Bayard v. Lombard,* 9 How. 530, 551, and in *Ex parte Tobacco Board of Trade,* 222 U. S. 578, it was announced, in a *per curiam* opinion, as a subject no longer open to dis-

cussion, that "one who is not a party to a record and judgment is not entitled to appeal therefrom," . . . .

United States ex rel. Louisiana v. Jack, 244 U. S. 397, 402 (1917).

Consonant with the general rule, we have held that one properly denied the status of intervenor cannot appeal on the merits of the case. *Hoots v. Commonwealth of Pennsylvania*, 495 F. 2d 1095 (3d Cir.), *cert. denied*, 419 U. S. 884 (1974). Accordingly, the appeal at No. 75-1236 will be dismissed.

IV.

Appellants have petitioned this court for an order compelling the appellee Commonwealth of Pennsylvania to pay $4,628.35, of the total cost of $6,144.20, for production of the 1898-page appendix filed in this appeal. Conceding that the parties might have been more selective in compiling the appendix, we nevertheless do not find the kind of abusive and unnecessary inclusions that would warrant the imposition of production costs on appellee pursuant to F. R. App. P. 30(b). We are mindful that appellants challenged, albeit unsuccessfully, not only the denial of intervention but also the merits of the district court's orders of December 27 and January 7: they alleged that the order of December 27 was not supported by any credible evidence, and that the order of January 7 was contrary to the weight of the evidence. (Appellants' Brief at 13 & 15). Such allegations, by their nature, contemplate comprehensive appellate review of the record. Accordingly, we deny the petition.

The judgment of the district court denying intervention, appealed at No. 75-1332, will be affirmed. The appeal at No. 75-1236 will be dismissed. Costs taxed against appellants.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 75-1236 and 75-1332

—

COMMONWEALTH OF PENNSYLVANIA, CLUB VALIANTS, INC., RONALD C. LEWIS, CHARLES G. HENDRICKS, ROBERT E. DOBSON, JOSEPH SAWYER, GEORGE T. ROBINSON, NORMAN MARTIN, RONALD ARRINGTON, SYLVESTER SIBERT, STEPHEN KERRIN, RONALD BYNG, FIELDING VAUGHN, RUDOLPH McKENNEY, IRA TABORNE, THOMAS LONEY, TYRONE MURRAY, JONATHAN CLARKE, LAWRENCE JONES, JOSEPH BLACKSHEAR, BENJAMIN ROBINSON, CHARLES A. WOODS

v.

JOSEPH R. RIZZO, Fire Commissioner, HILLEL LEVINSON, Managing Director, FOSTER B. ROSER, Personnel Director, LEWIS TAYLOR, Personnel Director, CLARENCE M. FARMER, Chairman, Philadelphia Commission on Human Relations, FRANK L. RIZZO, Mayor, GEORGE BUCHER, LEONARD L. ETTINGER, and HARRISON J. TRAPP, Civil Service Commissioners, CITY OF PHILADELPHIA Individually and in their official capacities.

FIRE OFFICERS UNION, JAMES P. LONGERGAN, LOUIS COMPANARO, JOHN C. McSLOY, RICHARD J. DARBY, ROBERT E. JONES, MICHAEL J. McCLINN, RICHARD J. SHARP, WILLIAM TROY, JOHN FRIEL, WILLIAM RICHMAN, PETER BLACK, MICHAEL BEAN, J. BRADLEY, B. ZINDELL, D. SMITH and G. GRIFFIN,

Appellants.

—

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D. C. Civil Action No. 74-258)

—

Present: ALDISERT, FORMAN and ADAMS, *Circuit Judges.*

Judgment.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed March 5, 1975, in *No. 75-1332,* be, and the same is hereby affirmed; and the appeal from the judgment of the said District Court filed January 7, 1975, in *No. 75-1236* be, and the same is hereby dismissed. Costs taxed against appellants.

ATTEST:

THOMAS F. QUINN
Clerk

January 21, 1976

APPENDIX B.

—

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

—

CIVIL No. 74-258

—

COMMONWEALTH OF PENNSYLVANIA, et al.
Plaintiffs

v.

JOSEPH R. RIZZO, et al.
Defendants

Findings of Fact and Conclusions of Law.

The Court has carefully reviewed and studied the evidence introduced at final hearing. After reviewing the evidence presented, and in consideration of the arguments advanced by the parties in support of their respective positions in this proceeding, the Court makes the following Findings of Fact and Conclusions of Law:

I.

FINDINGS OF FACT.

A. The Court hereby incorporates and reaffirms the Findings of Fact made in the Court's Opinion of July 26, 1974, at the close of the preliminary injunction hearing. *Commonwealth of Pennsylvania. et al. v. Rizzo, et al.,* 8 EPD ¶ 9681 (ED Pa. 1974). The evidence introduced at the preliminary injunction hearing has been made part of the record of the final hearing.

B. (1) The Court finds pursuant to the evidence submitted that the question of treatment of minorities, firemen

and all firemen, has been and continues to be of major concern to the present administration of the City of Philadelphia.

(2) The Court finds that the current administration of the City of Philadelphia has made reasonable efforts to eliminate any historical vestige or appearance of racial discrimination which may have arisen out of any past unintentional practices.

(3) This Court also finds that the current administration of the City of Philadelphia has exhibited the highest integrity and forthrightness of action and purpose in seeking to eliminate even the appearance of disparate treatment of its citizens and employees.

(4) To this end the Court finds that the City of Philadelphia has made reasonable good faith efforts, as hereinafter specified, to see that all citizens and employees in the City's Fire Department are treated equally without reference to race.

(5) This Court finds that the current administration of the City of Philadelphia voluntarily undertook numerous steps in its seeking to eliminate the historical vestiges of disparate treatment among its firefighters. These steps which were voluntarily undertaken are as follows:

(a) The City of Philadelphia voluntarily instituted a praiseworthy minority recruitment plan designed specifically to attract minority members to the Fire Department. The details of this praiseworthy plan are contained in Appendix A of this Court's Order and this Court's Findings of Fact and Conclusions of Law.

(b) In implementing this recruitment effort the City of Philadelphia voluntarily took the following steps:

(1) Gathering of data essential to define the the existence and scope of minority employment problems including:

(a) An informal survey in 1967 by the Human Relations Commission of City Employees Proportion of Negroes by Job Category and Department.

(b) A review of Personnel Selection Methods of the City of Philadelphia on April 19, 1970.

(c) A confidential report and survey by the Commission on Human Relations in September, 1970.

(2) Preparation of a recruiting plan for firemen on February 14, 1972, by Richard Garlatti.

(3) Voluntary cooperation with Club Valiants, Inc., in 1972 to present a substantially increased black recruitment.

(4) Entrance into a comprehensive Memorandum of Understanding on November 16, 1973, between Defendants, the Commonwealth of Pennsylvania and Club Valiants, Inc.

(c) The City of Philadelphia has voluntarily entered into contracts with the Educational Testing Service of New Jersey for the purpose of obtaining the best possible entrance examinations with the aim that such examinations will be totally free from any cultural bias and totally free of any disparate impact

on any persons because of race. To this Court's knowledge this is among one of the first undertakings of its kind in this country.

(d) The City of Philadelphia has voluntarily undertaken to construct new written promotion examinations for the positions of lieutenant and captain. The aim of such examinations is to be totally free from any cultural bias and totally free of any disparate impact on any person because of race.

(e) The City of Philadelphia voluntarily developed an interim entrance examination given in March, 1974. As a result of recruitment efforts approximately 28.7% more blacks took the entrance examination given on March 2, 1974, than took the previous examination on June 10, 1972. In June, 1972, approximately 20% of the candidates who took the written examination were black; on the other hand, in March of 1974, 48.7% of the candidates who took the written examination were black.

(f) The City of Philadelphia has voluntarily instituted procedures to see that:

Physical examinations; representation on boards and committees; job interviews; background investigation; rule of two; disciplinary action; written tests; job assignments; seniority system; pay benefits and rights, and all other procedures utilized with respect to personnel in the Fire Department are administratively equal regardless of race.

(6) The City of Philadelphia is voluntarily developing new promotion examinations for the ranks of lieutenant and captain.

(7) This Court finds as a matter of fact the current administration of the City of Philadelphia does not intentionally discriminate against any firefighters.

(8) This Court finds as a matter of fact that the current administration of the City of Philadelphia now has an intent to effectuate a policy and practice of living up to all of the provisions of Title VII of the Civil Rights Act.

C. In consideration of the additional evidence received at final hearing, the Court makes the following additional Findings of Fact:

Promotion Procedures

1. All positions within the uniformed ranks of the Philadelphia Fire Department are filled through Civil Service competitive examinations. Promotion comes entirely from the ranks of uniformed personnel. There are seven positions to which firemen are promoted. These are lieutenant, captain, fire battalion chief, fire deputy chief, assistant fire chief, fire boat engineer, and fire boat pilot. The position of lieutenant, fire boat engineer and fire boat pilot are filled by promotion from the ranks of fireman. The captain position is filled by promotion exclusively from lieutenant; the battalion chief position exclusively from captain; the deputy chief position exclusively from battalion chief; and the assistant fire chief from both the battalion chief and deputy chief.

2. In order to take the examination for fire boat engineer, a person must be a fireman for two years supplemented by the successful completion of a training program as a fireboat engineer; for fire boat pilot, two years experience as a fireman supplemented by the successful completion of a training program as a fire boat pilot; for lieutenant, two years of experience as a fireman; for cap-

tain, two years of experience as a lieutenant; for fire battalion chief, two years of experience as a captain; for fire deputy chief, two years of experience as a fire battalion chief; for assistant fire chief, four years of experience at or above the rank of fire battalion chief.

3. The promotional examinations for the positions of lieutenant and captain are entirely written. For the positions of fire battalion chief, fire deputy chief and assistant fire chief, a combination of written and oral is employed. For the positions of fire boat engineer and fire boat pilot, a combination of written and performance is used. A competitor must pass the written examination in order to be placed on the eligible list for promotion. When both a written and oral or performance are used, the competitor must pass both parts to be placed on the resultant eligible list.

4. Once the written or written/oral or written/performance examination has been passed, points are added to the score of seniority and performance reports. Such points are not obtained for candidates who fail any part of the examination. For passing candidates, an eligible list based on the composite scores of written, oral if applicable, performance if applicable, seniority, and performance reports is then established by the Personnel Department. Promotions are then made by the Fire Department from the eligible list for the respective class. There is a separate eligible list for each of the seven promotional positions.

5. The written examination for the classes of lieutenant and captain counts for 90% of this composite score. Seniority counts for 10%. Performance rating credit is added to the sum of these two scores. If an eligible has an overall rating of Outstanding, three points are added; if the overall rating is Superior, one and one-half points are added; if the overall rating is Satisfactory, no credits are given.

For the classes of fire boat engineer and fire boat pilot, the written examination counts for 50%, the performance examination for 40% and seniority for 10%. Performance rating credit is added as above.

For the classes of fire battalion chief, fire deputy chief, and assistant fire chief, the written examination counts for 60%, the oral examination for 30%, and seniority for 10%. Performance rating credit is added as above.

6. After the above calculations are made, persons who are eligible for promotion to each position are ranked in order of their composite scores, which are scaled from 70 points to 100 points. Selections for promotion are then made consecutively by rank from each list.

7. The net effect of seniority and performance credits on the ranking of the eligible list tends to be small. By far, the stronger determinants of whether a fireman will be promoted are the written examinations for positions of lieutenant and captain, the written and performance examinations for fire boat pilot and fire boat engineer, and the written and oral examinations for fire battalion chief, fire deputy chief and assistant fire chief.

8. The written examinations for promotion within the ranks of the Fire Department are constructed by the Examinations Division of the Philadelphia Personnel Department. The unit of the Examinations Division which constructs the fire promotional examinations also constructs the fire and police entrance examinations.

Statistical Evidence Concerning Promotions

9. As of October 12, 1973, the racial composition of the promotion ranks in the Fire Department was as follows:

Rank	*Total*	*Black*	*Percent of Rank Black*
Fire Boat Pilot and Engineer	17	1	5.9%
Lieutenant	302	28	9.3%
Captain	141	4	2.8%
Battalion Chief	48	1	2.1%
Deputy Chief	14	1	7.1%
Assistant Fire Chief	5	0	0%

10. Written promotion examinations for the positions of lieutenant, captain, battalion chief, deputy chief, and assistant fire chief were administered in September, and October, 1974. Eligible lists for those positions have been established based on those examinations.

11. 823 persons took the 1974 lieutenant examination. Of this number, 91 were black. 28.6 percent of the whites who took this examination passed, while 15.4 percent of the blacks who took this examination passed. Whites thus passed at a rate of 1.86 times that of blacks, and the difference in passing rates by race is statistically significant.

The 1974 eligible list for lieutenant contains 223 persons, of whom 15 are minorities.

12. 159 persons took the 1974 captain examination. Of this number, 18 were black. 65.2 percent of the whites who took this examination passed, while 27.8 percent of the blacks who took this examination passed. Whites thus passed at a rate of 2.35 times that of blacks, and the difference in passing rates by race is statistically significant.

The 1974 eligible list for captain contains 101 persons, of whom 5 are black.

13. 568 persons took the 1972 lieutenant examination. Of this number, 69 were black. 67.1 percent of the whites who took this examination passed, while 55.1 percent of the blacks who took this examination passed. Whites thus passed at a rate of 1.22 times that of blacks, and the difference in passing rates by race is statistically significant.

121 whites and 13 blacks were promoted from the 1972 eligible list for lieutenants.

14. (a) 157 persons took the 1972 captain examination. Of this number, 13 were black. 129 whites and 13 blacks passed this examination.

(b) While very few persons failed the 1972 captains examination, the limited number of captain positions to be filled resulted in only those scoring 80.23 or above on the test being considered for promotion. While 49.7 percent of the whites received scores at or above 80.23, only 30.8 percent of the blacks taking the examination received scores at or above 80.23.

Whites thus effectively passed the 1972 captain examination at a rate 1.62 times that of blacks, and the difference is statistically significant. 53 whites and 2 blacks were promoted from this eligible list.

15. The above statistics demonstrate that the lieutenant and captain promotion examinations have had a disparate impact on minority members of the Fire Department.

16. Since there were only six blacks at the rank of captain and above, it was impossible to do a statistical analysis of the racial effect of the promotion examinations for ranks above captain.

The racial composition of persons who passed the 1974 written examinations for promotion to ranks above captain is as follows:

Battalion Chief: 38 whites and 2 blacks;
Deputy Chief: 22 whites and 1 black;
Assistant Fire Chief: 8 whites and 0 blacks.

17. There are presently five black captains in the Philadelphia Fire Department of whom none, because of the time in grade requirement, are presently eligible to apply for promotions above the rank of captain.

Job-Relatedness of Promotion Examinations.

18. The Court cannot find that adequate job analyses have been conducted for use in preparing the lieutenant and captain promotion examinations.

19. The Court cannot find from the statistical evidence that scores on the written promotion examinations for lieutenant and captain predict with reasonable accuracy performance in the positions for which the tests are given.

20. Plaintiffs have presented evidence that the promotion examinations for lieutenant and captain have historically had a disparate impact against minorities for the reason that the examinations have failed to meet minimum accepted professional standards of validity and job-relatedness. Defendants have failed to demonstrate compliance with legally established standards of validity and job-relatedness.

Use of the Rule of Two in Hiring.

21. As found in the Findings of Fact of July 26, 1974, the Rule of Two, whereby high ranking officials of the Fire Department choose two of three qualified applicants, provides opportunity for discriminatory selection. The decision of the selecting officers includes to a considerable degree such subjective factors as attitude and the employment record of the applicant.

22. Records as to the utilization of the Rule of Two exist only for the period of November, 1972, through the

present. During that period, 35 applicants were rejected under the Rule of Two, of whom 11, or 31.4% were black. Of the 35 applicants who were rejected, reasons are listed for only 12.

23. There is no formal procedure whereby an applicant rejected under the Rule of Two can appeal that rejection.

Individual Cases

24. The parties have settled the claims of all of the individual cases in accordance with a Stipulation of Settlement entered into by counsel for the parties and filed with the Court.

Costs

25. Plaintiffs' costs in this litigation are $9,530.00. The parties have stipulated that one-half of this amount shall be borne by Defendants and one-half by Plaintiffs.

Attorneys Fees

26. Counsel for the Commonwealth of Pennsylvania have not requested an award of attorneys fees.

27. Counsel for the individual Plaintiffs and the Club Valiants, Inc., Robert Reinstein and Kenneth Johnson, have requested an award of attorneys' fees. In light of the valuable public service performed by counsel in prosecuting this litigation, the results obtained, the competence and experience of counsel, and the fees customarily charged in this District, the Court finds that an award of $40.00 per hour for 409 hours for Mr. Reinstein and 102 hours for Mr. Johnson is fair and reasonable.

II.

CONCLUSION OF LAW

A. The Court hereby incorporates and reaffirms the Conclusions of Law made in the Court's Opinion of July 26, 1974, at the close of the preliminary injunction hearing. *Commonwealth of Pennsylvania, et al. v. Rizzo, et al.*, 8 EPD § 9681 (ED Pa. 1974).

B. As a result of the additional evidence introduced at the final hearing, the Court makes the following additional Conclusions of Law:

1. The Plaintiffs have established a *prima facie* case of racial discrimination with respect to the historic promotion practices of the Philadelphia Fire Department based on the disparate effects of the lieutenant and captain promotion examinations and on the low percentage of minorities in the upper ranks of the Fire Department which result from past discrimination.

2. Upon a *prima facie* showing of discrimination the burden shifts to a defendant-employer to prove that the selection procedures in question are valid and job-related; the intent or motive of a Defendant-employer is legally irrelevant.

3. The Defendants have not met their burden of proving that the written promotion examinations are valid and job-related.

4. The written promotion examinations of the Philadelphia Fire Department have violated the legal requirements of Title VII of the Civil Rights Act of 1964, 42 U. S. C. 2000e, and the Civil Rights Acts of 1866 and 1870, 42 U. S. C. §§ 1981 and 1983.

5. Upon a finding of discrimination even though unintentional, courts have not merely the power, but the duty to render a decree which so far as possible eliminates the discriminatory effects of the past as well as bars like discrimination in the future.

6. Based on the record in this case, affirmative promotion relief is appropriate. Discrimination in promotion would result if promotions were made sequentially from the eligibility lists based upon the challenged promotion examinations. Until Defendants are able to select persons for promotion from nondiscriminatory and valid promotion examinations, the public interest requires that qualified minority and white candidates be promoted in a fair and equitable ratio.

7. No person has a vested interest in any specific position on an eligibility list based upon a discriminatory promotion examination; if a person appears in a certain position on an eligibility list prepared in violation of the law, his right to remain in that certain rank must give way to the lawful requirement to avoid discriminatory promotions.

8. Minority applicants who were not hired or promoted because of their scores on past written examinations, and who pass the new valid examination are entitled to such reasonable relief, by reason of past discrimination, as the Court shall determine.

9. Plaintiffs performed a valuable public service in prosecuting this litigation and are entitled to reasonable attorneys' fees and costs. 42 U. S. C. 2000e.

By The Court

/s/ LOUIS C. BECHTLE
Louis C. Bechtle, *J.*

Dated: January 7, 1975

APPENDIX A.

B. With regard to appointments to the Fire College Class next following the one scheduled to begin November 19, 1973:

• • •

4. Pursuant to its existing equal employment opportunity policy, the City will continue to encourage the further recruitment of minority persons by all means at its disposal including but not limited to the following:

a. Continued and increased advertising of employment opportunities in the three major newspapers. Such ads will clearly indicate that the City is an equal opportunity employer.

b. Continued and increased advertising of employment opportunities in such minority media as:

(1) black newspapers (Tribune, Nite Life, etc.);

(2) neighborhood newspapers serving black communities;

(3) the use of black radio stations and programs;

(4) the use of billboards, buses and subways maintained or operating in black neighborhoods.

c. Conducting of recruitment programs in predominantly black high schools, encouraging seniors to apply for Fireman positions.

d. Presenting of fire safety and other programs at all public and parochial schools with large black enrollments, encouraging minority student interest in the Philadelphia Fire Department.

c. Developing on-going liaison with the Valiants, Inc., for the purpose of utilizing any expertise in the implementation of affirmative recruiting action and as a barometer of the effectiveness of such action in the black and Spanish communities.

5. The City agrees to avail itself of the following sources of minority applicants and shall furnish such sources with announcements of Fireman-positions civil service openings, as well as other recruitment material:

a. State employment Service and Job Bank networks.

b. Recruitment sources such as the Apprenticeship Information Center, OIC, Urban Coalition, etc.

6. The City agrees to encourage more positive relations with the black community, recruitment presentations will be made by Fire Department personnel as part of their regular duties as firefighters at services conducted at black churches, where possible.

MINORITY RECRUITMENT AND QUALIFYING PROGRAM FOR THE PHILADELPHIA FIRE DEPARTMENT.

In order to insure the hiring of the best and most qualified applicants in all uniformed ranks of the Fire Department without regard to race, and in order to eliminate any question of discrimination, the following procedures as adopted:

I. Recruitment.

A. The Department will attempt to maximize public contact, bringing its existing equal employment opportunity policy to all segments of the minority community. In order to encourage the further recruitment of minority persons, the following steps including but not limited to those specified herein, will be undertaken:

1. Continued advertising of employment opportunities in the three major newspapers. Such ads will clearly indicate that the Department is an equal opportunity employer.

2. Continued advertising of employment opportunities in such media as:

   a) Black newspapers (Tribune, Nite Life, etc.);

   b) neighborhood newspapers serving black communities;

   c) the use of Spanish-language columns appearing in the three major newspapers;

   d) the use of black radio stations and programs;

   e) the use of billboards, buses and subways maintained or operating in black neighborhoods;

   f) job announcements will be issued in Spanish as well as in English.

3. Conducting of recruitment programs in predominantly black high schools, encouraging seniors to apply for Fireman positions.

4. Presenting of fire safety and other programs at all public and parochial schools with large black and Spanish speaking enrollments, encouraging minority student interest in the Fire Department.

5. Developing on-going liaison with the Valiants, Inc. for the purpose of utilizing any expertise in the implementation of affirmative recruiting action and as a barometer of the effectiveness of such action in the black and Spanish communities.

B. The Department will avail itself of the following sources of minority applicants and shall furnish such sources with announcements of Fireman-positions civil service openings, as well as other recruitment material:

1. Local military bases which are points of contact for service personnel and for veterans, such as Fort Dix, Philadelphia Naval Base, Veterans Administration, etc.

2. State Employment Service and Job Bank network.

3. Recruitment sources such as the Apprenticeship Information Center, OIC, Urban Coalition, etc.

C. To encourage more positive relations with the black and Spanish communities, recruitment presentations will be made by Fire Department personnel at Sunday services conducted at black and Spanish churches, where possible.

D. The Department will initiate human relations training under the aegis of the Philadelphia Human Relations Commission, at the Fire Academy for all new appointees and will consider such training for current employees, particularly those who may sit on initial boards or on oral boards which consider candidates for promotion.

II. Qualifications.

A. The Educational Testing Service of Princeton, N. J., will be engaged by the City to develop a qualifying examination, or to revise the present examination, for the purpose of insuring an examination that is even more than presently related to job and performance criteria. Every attempt will be made to have such examination completed or revised, and ready for use, by the time of the next holding of the Fireman examination.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

—

Civil No. 74-258

—

COMMONWEALTH OF PENNSYLVANIA, et al.
Plaintiffs

v.

JOSEPH R. RIZZO, et al.
Defendants

Order.

And Now, this 7th day of January, 1975, having considered the evidence submitted by the parties, and having made findings of fact and conclusions of law, the Court hereby enters the following as a Final Order in this case:

I.

Class Relief.

A. Hiring.

1. Defendants are enjoined from appointing new uniformed firefighters to the Philadelphia Fire Department unless the new firefighters are hired from the current eligibility list in a ratio of one qualified minority for every two qualified whites. This injunction shall remain in effect until a valid, job-related examination and other neutral selection procedures are developed and implemented to the satisfaction of this Court.

2. (a) Defendants have engaged the services of the Educational Testing Service of Princeton, New Jersey, to construct and validate new qualifying entrance examinations.

Defendants shall develop a job related physical agility test in which applicants shall be graded according to objective standards. Defendants shall obtain a recommendation from the Educational Testing Service as to the method of grading and the weight to be given the physical agility test in determining the rank of applicants on the eligibility list. Following submission of this recommendation to the Court, and any other evidence which the parties may present, the Court shall determine the method of grading and weight to be given the physical agility test.

(b) The new examinations shall be constructed and validated in compliance with the EEOC Guidelines or applicable law. Evidence of the validity of the new examinations shall be submitted to the Court and to counsel for Plaintiffs and the examinations shall be put into use, if approved by the Court.

(c) Thereafter, at a time to be determined by the Court when it approves the new examinations for use, Defendants shall report to the Court and counsel for Plaintiffs information concerning the racial impact of the new examinations and whether the examinations have validity for applicants hired subsequent to passing them. In order to comply with this requirement, Defendants shall record the race of each person who applies to the Philadelphia Fire Department.

(d) As provided in this Court's Order of August 21, 1974, and Order and Opinion of July 26, 1974, the Defendants shall submit to the Court and Plaintiffs' counsel every six months a written report covering the progress of the development and construction of the new qualifying entrance examinations. The first such written report is due January 26, 1975.

(e) To the extent that the policies, business practices, and contractual relations permit, Plaintiffs' representatives shall be allowed to monitor and participate in the test construction.

3. (a) When the new, valid entrance examinations are approved for use by the Court, all minority applicants to the Fire Department who did not get hired because of their score on any written entrance examination administered since January 1, 1972, shall be afforded an opportunity, and notified in writing by Defendants (by first class mail, and in a form to be approved by the Court) of their opportunity, to take the new examination. The costs of such notice shall be borne as follows: two-thirds (⅔) by the Defendants, and one-third (⅓) by the Plaintiffs. Defendants shall prepare a list of all such persons to be notified which shall be sent to Plaintiffs' counsel. Plaintiffs shall have ten (10) business days from receipt of said list to make any additions or corrections. After said 10 days, said list shall be final for all purposes.

(b) All such minority applicants who successfully pass the new examinations shall be certified as eligible for appointment. An additional seven (7) points shall be added to their final average on the certified eligible list. This eligible list shall remain in effect for two (2) years, unless it is earlier exhausted or dissolved by order of this Court. The Defendants shall have the right at the end of one year to apply to the Court for the dissolution of said eligibility list. The Court at said time shall hear any evidence submitted by the parties on the question, and determine the issue on the merits.

(c) When the aforesaid eligible list is constructed, the Court shall determine upon application of Plaintiffs, presentation of evidence by the parties and hearing,

whether the existing age requirements should be modified with respect to any individual minority applicants on such list who were not hired in the past because of their score on a written entrance examination.

4. Defendants shall make reasonable good faith efforts to have minority representation on all hiring interview boards. The Defendants have no duty, however, to insure minority representation on each and every interview board.

5. (a) All minority applicants to the Fire Department who have been rejected for employment as firefighters since January 1, 1970, or who are rejected in the future, for any reason other than a failure of the written entrance examination or physical examination, shall receive a short summary of the specific reasons relied upon for rejection and a notification of their right to appeal. Defendants shall promptly notify each such person in writing by first class mail, of this opportunity to appeal and the procedures for appeal hereinafter set forth. Said notice may provide that such person must request an appeal within thirty (30) days from receipt of the notice. The form of said notice will be approved by the Court. Any such person may obtain a review of his case by the Appeal Panel hereinafter provided for, including the right to a personal appearance if desired and the opportunity to produce countervailing evidence.

(b) Failure to appeal within the time specified in the notice of appeal shall be deemed a final waiver of any and all appeal rights.

(c) Cost of said notice shall be borne as follows: two-thirds (⅔) by the Defendants and one-third (⅓) by the Plaintiffs.

(d) An Appeal Panel shall be established consisting of three members, two of whom shall be members of

the Fire Department. One of these Fire Department members shall be designated by the Fire Department; one of these Fire Department members shall be designated by the Plaintiffs; the non-Fire Department member shall be designated by the Court. The non-Fire Department member of the Panel designated by the Court shall receive compensation for his services in an amount to be approved by the Court, to be paid half by the Defendants and half by the Plaintiffs.

(e) The Appellant and the Fire Department shall have the right to be represented by counsel before the Appeals Panel. Counsel shall have the right to present evidence, argument, and briefs and shall have the right to be heard on any and all matters before said Panel.

(f) The Appeals Panel shall adopt rules as nearly the same as practicable to those adopted by the Appeal Panel created by order of Court, April 10, 1973, *Commonwealth v. O'Neill*, 70-3500. This, however, shall not preclude the Panel from adopting rules and regulations of the Philadelphia Civil Service Commission where necessary.

(g) All decisions by the Panel shall be by majority vote. For any action taken by the Panel to be valid, such action must be taken by at least two votes. Two members shall constitute a quorum of the Panel.

(h) In all cases submitted to the Panel for review, the decision of the Panel shall be final. No appeal from a decision of the Appeals Panel shall lie to any court, tribunal, or panel, judicial, quasi-judicial, or otherwise.

(i) The Panel shall notify the Appellant and Defendants of its decision regarding any person who has made any appeal to them. The Panel's notice to Defendants shall be in writing and shall be made ten (10) days before any effective date of commencement of reinstate-

ment, or any other relief given Appellant. Cost of such notification shall be borne two-thirds (⅔) by Defendants and one-third (⅓) by Plaintiffs.

(j) All minority applicants (except those individual Plaintiffs whose rights are settled by Stipulation of Counsel, approved and adopted by this Court in Section II of this Order), who are hired as a result of the appeal process shall be given retroactive seniority for pay purposes, as if they had been hired from the date of the first hiring from the certified eligible list to which the applicants first sought placement. Any applicants in this group who are hired as a result of the appeal process will be eligible for appointment to the immediately following Fire College class.

(k) Any question of age as to any individual applicants to be hired as a result of the appeal process will be resolved by agreement of the parties or by the Court upon application of the Plaintiffs and submission of evidence and argument by the parties.

(l) The Appeal Panel shall remain in existence for a period not to exceed two years. At the time of its dissolution, the Court shall determine whether, and in what manner, it shall continue to exist.

6. Defendants shall continue their existing minority recruiting efforts, including those specified in paragraphs B(4), (5), and (6) of the Memorandum of Understanding made by and between the Commonwealth of Pennsylvania, Club Valiants, Inc., and the City of Philadelphia, November 16, 1973, and I. "Recruitment" of the Minority Recruitment and Qualifying Program for the Philadelphia Fire Department, June 6, 1973, attached hereto, as Appendix A and incorporated and made a part herein by this reference.

7. In order to implement the Department's Minority Recruitment and Qualifying Program and the Memorandum of Understanding, Defendants have established a Minority Recruitment Unit within the Philadelphia Fire Department and have assigned at least six black firefighters to this Unit. This Unit shall continue to exist as a specific unit during recruiting periods.

B. Promotions.

8. This Court's Order in this case of December 27, 1974, is attached hereto and made a part hereof.

9. Defendants shall obtain validated new written promotion examinations for the ranks of lieutenant and captain. The examinations may be constructed by the Philadelphia Personnel Department, or under its direction by experts of its choosing, provided, however, that Plaintiffs' representatives shall be allowed to monitor and participate in the test construction at Plaintiffs' expense. In the event of any dispute concerning construction of these tests, either party may apply to the Court for appropriate relief. The new written promotion examinations shall be constructed and validated in accordance with the EEOC Guidelines or applicable law. Evidence of validity of the new examinations shall be submitted to the Court and to counsel for Plaintiffs, and the examinations shall be put into use if approved by the Court.

At a time to be determined by the Court, Defendants shall report to the Court information concerning the racial impact of the new examinations and whether the examinations have validity for the persons promoted. Defendants may keep any racial records necessary to comply with this requirement.

10. The parties shall submit to the Court within 60 days in affidavit form, evidence as to the validity of all

promotional examinations above the rank of captain. Subsequent to that time, upon application of either party, the Court, after considering the evidence and arguments of the parties, shall determine what, if any, appropriate relief is necessary.

11. Defendants shall make good faith efforts to have minority representation on oral rating and review board. Defendants have no duty, however, to insure minority representation on each and every board.

12. All promotions to be made during the time between the date of this Order and the approval of the new promotion examinations by this Court shall be made in accordance with the following requirements:

(a) Lieutenants

(1) Except as provided herein, in the future, when Defendants promote eligible nonminority firefighters to the position of lieutenant; then Defendants will promote out of 100%, a ratio of at least 15% eligible minority firefighters from the current existing lieutenant's eligibility list.

(2) Defendants are under no duty to promote anyone, qualified minority or qualified non-minority to the position of lieutenant.

(3) Defendants have a duty to promote 15% qualified minority firefighters to position of lieutenant only when they promote qualified non-minorities to the position of lieutenant.

(4) Defendants are under a duty to promote 15% qualified minorities to position of lieutenant only when such persons appear on the current eligibility list in sufficient numbers to achieve such percentages.

(5) Where there does not exist sufficient numbers of qualified minority members on the current eligibility list to be promoted to lieutenant in a ratio of 15% qualified minorities out of 100% persons to be promoted, Defendants are under a duty only to promote that percentage of qualified minority members less than 15%, who are then on the current eligibility list for promotion, rounding off to the lowest percentage representing one whole person.

(6) If there are no qualified minority applicants on the current eligibility list for promotion, then Defendants are under no duty to promote any minority applicant, but have the absolute and unqualified right to promote any qualified eligible persons to the position of lieutenant.

(7) The provisions of this paragraph shall be automatically dissolved upon approval by the Court, in accordance with this Order, of new promotional examinations for the position of lieutenant. Counsel for any party of record may apply to the Court at any time after six (6) months for dissolution or modification of this provision deemed warranted by the circumstances.

(8) Defendants shall notify counsel for the Plaintiffs of their intention to make any promotion to the rank of lieutenant at least twenty (20) business days prior to the proposed effective date of said promotions.

(b) Captains

(1) Except as provided herein, in the future, when Defendants promote eligible non-minority firefighters to the position of captain; then Defendants will promote out of 100% a ratio of at least 15% eligible

minority firefighters from the current existing captain's eligibility list.

(2) Defendants are under no duty to promote anyone, qualified minority or qualified non-minority to the position of captain.

(3) Defendants have a duty to promote 15% qualified minority firefighters to position of captain only when they promote qualified non-minorities to the position of captain.

(4) Defendants are under a duty to promote 15% qualified minorities to position of captain only when such persons appear on the current eligibility list in sufficient numbers to achieve such percentages.

(5) Where there does not exist sufficient number of qualified minority members on the current eligibility list to be promoted to captain in a ratio of 15% qualified minorities out of 100% persons to be promoted, Defendants are under a duty only to promote that percentage of qualified minority members less than 15%, who are then on the current eligibility list for promotion, rounding off to the lowest percentage representing one whole person.

(6) If there are no qualified minority applicants on the current eligibility list for promotion, then Defendants are under no duty to promote any minority applicant, but have the absolute and unqualified right to promote any qualified eligible person to the position of captain.

(7) The provisions of this paragraph shall be automatically dissolved upon approval by the Court, in accordance with this Order, of new promotional examinations for the position of captain. Counsel for

any party of record may apply to the Court at any time after six (6) months for dissolution or modification of this provision deemed warranted by the circumstances.

(8) Defendants shall notify counsel for the Plaintiffs of their intention to make any promotion to the rank of captain at least twenty (20) business days prior to the proposed effective date of said promotions.

(c) Battalion Chief

(1) The Defendants shall promote to the rank of battalion chief two qualified minority members who are on the current eligibility list for battalion chief whenever promotions to such rank are next made.

(2) Defendants have the right to promote to battalion chief any number of non-minority persons who are qualified and on the current eligibility list, without regard to the percentage of qualified minorities promoted to position of battalion chief.

(3) Defendants are under no duty to promote anyone, qualified minority or non-minority to the position of battalion chief.

(4) All Defendants' duties under this provision relating to promotion of battalion chiefs shall be automatically dissolved upon promotion of two qualified minorities on current eligibility list to position of battalion chief. Thereafter, Defendants are under no duty or obligation to promote any fixed percentage or ratio of qualified minorities to the position of battalion chief.

(5) Defendants shall notify counsel for Plaintiffs of their intention to make any promotion to the rank

of battalion chief at least twenty (20) business days prior to the proposed effective date of said promotions.

(6) The obligations under paragraphs (1) and (4) of this Section have been fully complied with by the promotions on December 20, 1974, pursuant to the Court's Order of December 27, 1974 (see Order attached hereto).

(d) Deputy Chief

(1) The Defendants shall promote to the rank of deputy chief one qualified minority member who is on the current eligibility list for deputy chief whenever promotions to such rank are next made.

(2) Defendants have the right to promote to deputy chief any number of non-minority members who are qualified and on the current eligibility list, without regard to the percentage of qualified minorities promoted to position of deputy chief.

(3) Defendants are under no duty to promote anyone, qualified minority or non-minority to the position of deputy chief.

(4) All Defendants' duties under this provision relating to promotion of deputy chiefs shall be automatically dissolved upon promotion of one qualified minority on the current eligibility list to position of deputy chief. Thereafter, Defendants are under no duty or obligation to promote any fixed percentage or ratio of qualified minorities to the position of deputy chief.

(5) Defendants shall notify counsel for Plaintiffs of their intention to make any promotion to the rank of deputy chief at least twenty (20) business days

prior to the proposed effective date of said promotions.

(6) The obligations under paragraphs (1) and (4) of this Section have been fully complied with by the promotions on December 30, 1974, pursuant to the Court's Order of December 27, 1974. (see Order attached hereto).

(e) Other Positions

There are no duties or obligations imposed upon Defendants with regard to any other positions in the Fire Department, except as may be specifically stated in this Order. Defendants shall not abolish any present promotion rank or create any promotion ranks in the Philadelphia Fire Department without prior approval of this Court.

13. (a) When the new, valid written promotion examinations for lieutenant and captain are approved for use by the Court, all eligible minority applicants for promotion, including those who were rejected for promotion because of their scores on any previous written promotion examination, shall have the right to take the new examination.

(b) All such minority applicants for promotion who successfully pass the new promotion examinations shall be eligible for promotion and shall be *prima facie* entitled to further relief. When the eligible list is constructed, the parties shall negotiate in good faith to agree upon what relief shall be afforded to such persons. If the parties are unable to agree, any party may apply to the Court for any relief it deems appropriate; and the Court shall determine the matter upon consideration of the evidence and arguments of the parties.

C. Assignments

14. Defendants shall make reasonable good faith efforts to see that minority firefighters shall be appointed or assigned to all committees or boards of the Fire Department. Defendants are not, however, under a duty to insure minority representation on each and every committee or board.

15. Three black firefighters have been assigned to the Fire College. Defendants shall make all reasonable good faith efforts to continue minority representation on the Fire College instructional staff, consistent with the requirements that all persons so appointed shall be fully qualified in all respects. Defendants have no duty, however, to insure minority representation on the Fire Department instructional staff.

16. Defendants shall continue to make reasonable good faith efforts to have minority representation on all Trial Boards of Investigation. Defendants have no duty to insure minority representation on each and every Trial Board of Investigation.

II.

INDIVIDUAL CASES.

The Stipulation of Counsel concerning the resolution of the claim of all individual Plaintiffs, which has been filed with the Court, is hereby approved and adopted by the Court.

III.

COSTS.

Defendants shall pay Plaintiffs the sum of $4,765.00 as reimbursement for one-half of the costs of this litigation. The City of Philadelphia shall make such payment to

Plaintiffs within ninety (90) days from the date of this Order.

IV.

ATTORNEYS' FEES.

Defendants shall pay Plaintiffs' attorneys, ROBERT REINSTEIN and KENNETH JOHNSON, attorneys fees in the amount of $20,440, which represents reimbursement at the rate of $40.00 per hour for 511 hours of work. Counsel for the Commonwealth of Pennsylvania has not requested attorneys' fees, and no award is made to same. The City of Philadelphia shall make such payment to Plaintiffs' counsel within ninety (90) days of the date of this Order.

V.

REPORTING REQUIREMENT.

Defendants shall submit written reports to the Court and the counsel for Plaintiffs every six months beginning six months from the date of this Decree, detailing the implementation of each provision of this Decree.

VI.

APPLICATION FOR MODIFICATION.

Any party may apply to the Court at any time for an Order modifying any of the terms of this Decree. Reasonable notice of such application shall be given to counsel for each party.

VII.

RETENTION OF JURISDICTION.

This Court retains jurisdiction over all aspects of this controversy.

LOUIS C. BECHTLE, *J.*

APPENDIX A.

B. With regard to appointments to the Fire College Class next following the one scheduled to begin November 19, 1973:

• • •

4. Pursuant to its existing equal employment opportunity policy, the City will continue to encourage the further recruitment of minority persons by all means at its disposal including but not limited to the following:

a. Continued and increased advertising of employment opportunities in the three major newspapers. Such ads will clearly indicate that the City is an equal opportunity employer.

b. Continued and increased advertising of employment opportunities in such minority media as:

(1) black newspapers (Tribune, Nite Life, etc.);

(2) neighborhood newspapers serving black communities;

(3) the use of black radio stations and programs;

(4) the use of billboards, buses and subways maintained or operating in black neighborhoods.

c. Conducting of recruitment programs in predominantly black high schools, encouraging seniors to apply for Fireman positions.

d. Presenting of fire safety and other programs at all public and parochial schools with large black enrollments, encouraging minority student interest in the Philadelphia Fire Department.

e. Developing on-going liaison with the Valiants, Inc., for the purpose of utilizing any expertise in the implementation of affirmative recruiting action and as a barometer of the effectiveness of such action in the black and Spanish communities.

5. The City agrees to avail itself of the following sources of minority applicants and shall furnish such sources with announcements of Fireman-positions civil service openings, as well as other recruitment material:

a. State employment Service and Job Bank networks.

b. Recruitment sources such as the Apprenticeship Information Center, OTC, Urban Coalition, etc.

6. The City agrees to encourage more positive relations with the black community, recruitment presentations will be made by Fire Department personnel as part of their regular duties as firefighters at services conducted at black churches, where possible.

MINORITY RECRUITMENT AND QUALIFYING PROGRAM FOR THE PHILADELPHIA FIRE DEPARTMENT.

In order to insure the hiring of the best and most qualified applicants in all uniformed ranks of the Fire Department without regard to race, and in order to eliminate any question of discrimination, the following procedures as adopted:

I. Recruitment.

A. The Department will attempt to maximize public contact, bringing its existing equal employment opportunity policy to all segments of the minority community. In order to encourage the further recruitment of minority persons, the following steps including but not limited to those specified herein, will be undertaken:

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2. Continued advertising of employment opportunities in such media as:

   a) Black newspapers (Tribune, Nite Life, etc.);

   b) neighborhood newspapers serving black communities;

   c) the use of Spanish-language columns appearing in the three major newspapers;

   d) the use of black radio stations and programs;

   e) the use of billboards, buses and subways maintained or operating in black neighborhoods;

   f) job announcements will be issued in Spanish as well as in English.

3. Conducting of recruitment programs in predominantly black high schools, encouraging seniors to apply for Fireman positions.

4. Presenting of fire safety and other programs at all public and parochial schools with large black and Spanish speaking enrollments, encouraging minority student interest in the Fire Department.

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B. The Department will avail itself of the following sources of minority applicants and shall furnish such sources with announcements of Fireman-positions civil service openings, as well as other recruitment material:

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   2. State Employment Service and Job Bank network.

   3. Recruitment sources such as the Apprenticeship Information Center, OIC, Urban Coalition, etc.

C. To encourage more positive relations with the black and Spanish communities, recruitment presentations will be made by Fire Department personnel at Sunday services conducted at black and Spanish churches, where possible.

D. The Department will initiate human relations training under the aegis of the Philadelphia Human Relations Commission, at the Fire Academy for all new appointees and will consider such training for current employees, particularly those who may sit on initial boards or on oral boards which consider candidates for promotion.

II. QUALIFICATIONS.

A. The Educational Testing Service of Princeton, N. J., will be engaged by the City to develop a qualifying examination, or to revise the present examination, for the purpose of insuring an examination that is even more than presently related to job and performance criteria. Every attempt will be made to have such examination completed or revised, and ready for use, by the time of the next holding of the Fireman examination.

APPENDIX C.

COMMONWEALTH OF PENNSYLVANIA et al.

v.

Joseph R. RIZZO, Fire Commissioner, et al.
Civ. A. No. 74-258.

United States District Court,
E. D. Pennsylvania.

March 5, 1975.

Israel Packel, Atty. Gen., Robert P. Vogel, Asst. Atty. Gen., Robert Reinstein, Philadelphia, Pa., for plaintiffs.

Stephen Arinson, Asst. City Solicitor, Philadelphia, Pa., for defendants.

Memorandum and Order.

BECHTLE, *District Judge.*

This matter comes before the Court on petitioners' motion for leave to intervene pursuant to Rules 24(a) and 24(b) of the Federal Rules of Civil Procedure. The petitioners are the Fire Officers Union of the City of Philadelphia and individual firemen and officers in the Philadelphia Fire Department who have taken and passed the required examination for promotions within the Fire Department. Because the motion for leave to intervene was not timely filed within the meaning of Rule 24, it will be denied.

An understanding of the factual backdrop against which the petitioners' motion to intervene as defendants must be examined is essential to a proper resolution of the application for intervention. Plaintiffs filed the complaint in this action on January 31, 1974, alleging racial discrimination in the hiring and promotion procedures employed

by the City of Philadelphia and the Philadelphia Fire Department. Following extensive discovery and the disposition of several pretrial motions, an evidentiary hearing was held during June and July, 1974, on plaintiffs' motion for a preliminary injunction. On July 26, 1974, at the conclusion of the eight-day hearing, this Court granted the motion for a preliminary injunction. The preliminary injunction enjoined the Philadelphia Fire Department from hiring any new uniformed firemen unless one qualified minority candidate was selected for every two white candidates selected. No evidence was presented, nor did the Court rule, on the issue of discrimination in promotion during the hearing on the motion for preliminary relief. On August 5, 1974, the Court entered an Order setting December 2, 1974, as the date for the final hearing in this matter. In light of the pronounced intent of the involved parties to amicably resolve the issues still in dispute, the hearing scheduled for December 2, 1974, was continued and a series of settlement conferences were held for the purpose of disposing of the questions yet unresolved without the need for a formal evidentiary hearing. On December 27, 1974, upon consideration of plaintiffs' motion for an injunction *pendente lite*, the Court entered an Order specifying the racial composition of promotions to be made by the Fire Department on December 30, 1974. The Court then scheduled a final hearing for January 7, 1975. In lieu of oral testimony, plaintiffs and defendants stipulated to the introduction of evidence and the testimony that certain witnesses would give if called. Various individual claims were settled and made a part of the above stipulation. Based upon the evidence presented, and the applicable law, the Court made findings of fact and conclusions of law and entered a final Order disposing of the unresolved issues.

The Fire Officers Union and individual officers presently on the promotion list moved for leave to intervene on January 6, 1975, one day before the Court's final Order was entered and ten days after the granting of the injunction *pendente lite*. The individual firemen filed their petition to intervene on December 30, 1974, three days after the injunction *pendente lite* was granted. On January 23, 1975, the Fire Officers Union, officers, and firemen presently on the promotion list jointly filed a supplemental motion for leave to intervene and legal memorandum in support thereof. Essentially, the petitioners seek to intervene in this action in order to challenge the Court's Orders of December 27, 1974, and January 7, 1975, insofar as such Orders require the promotion of officers in the Philadelphia Fire Department out of the order in which such persons are on the current promotion list.

Intervention pursuant to Rules 24(a) and 24(b) is permissible only upon "timely application." NAACP v. New York, 413 U. S. 345, 93 S. Ct. 2591, 37 L. Ed. 2d 648 (1973); United States v. Blue Chip Stamp Company, 272 F. Supp. 432 (C. D. Calif. 1967), aff'd sub nom. Thrifty Shoppers Scrip Co. v. United States, 389 U. S. 580, 88 S. Ct. 693, 19 L. Ed. 2d 781 (1968). An application for intervention deemed untimely by the Court to which it is addressed must be denied. While the point to which the suit has progressed is one factor in the determination of whether an application is timely, "timeliness is to be determined from all the circumstances." NAACP v. New York, *supra*, 413 U. S. at p. 366, 93 S. Ct. at p. 2603. The Court must look to related circumstances, including the purpose for which intervention is sought, the necessity for intervention as a means of preserving the applicants' rights and the extent to which intervention will prejudice the rights of the parties already in the case. Hodgson v. United Mine

Workers of America, 153 U. S. App. D. C. 407, 473 F. 2d 118 (1972).

We recognize that the point to which the suit has progressed is not in and of itself dispositive of the issue of timeliness. Nonetheless, the Court is also not unmindful of the well-established principle that intervention after entry of a final judgment will not be allowed unless a "strong showing is made," United States v. Blue Chip Stamp Company, *supra,* 272 F. Supp. at p. 435; Wright & Miller, Federal Practice and Procedure: Civil § 1916 (1972), or where unusual and compelling circumstances are demonstrated. McDonald v. E. J. Lavino Company, 430 F. 2d 1065 (5th Cir. 1970); Minersville Coal Co., Inc. v. Anthracite Export Ass'n, 58 F. R. D. 612 (M. D. Pa. 1973).

As discussed previously, the first petition for leave to intervene was filed three days after the injunction *pendente lite* was granted and seven days prior to the entry of the Court's final Order. The second application for intervention was made the day before the final Order was entered in this case. It must also be noted that the motions for intervention were filed almost a full year after the filing of the complaint and five months after the hearing and decision on plaintiffs' motion for a preliminary injunction.

Furthermore, the intervenors cannot reasonably claim that they were unaware of the filing of the complaint, the granting of the preliminary injunction, or the pendency of the proceedings that ultimately culminated in the entry of the final Order on January 7, 1975. There was continuous and extensive media coverage of the nature and scope of the instant litigation, including, but not limited to, newspaper articles appearing in the Philadelphia Inquirer, Bulletin and Daily News. In February, 1974, copies of the complaint in this action were circulated by departmental mail to fire stations throughout Philadelphia.

An affidavit submitted by Ronald Lewis, the past president of the Club Valiants, Inc., (a plaintiff herein) shows that discussions were held with individual members of the Fire Officers Union concerning the likelihood of suit and the nature of the relief sought.

Petitioners had every opportunity to intervene in this law suit. The nature of the relief sought and granted in connection with the plaintiffs' motion for preliminary injunction should have alerted the petitioners to the likely necessity for intervention. The applicants failed to exercise their right to intervene in this action. The Court concludes, therefore, that the applications for intervention are untimely.

The law is clear that it is within the discretion of the district court to deny a petition to intervene if it is not timely. NAACP v. New York, *supra,* 413 U. S. at p. 366, 93 S. Ct. 2591; Hoots v. Commonwealth of Pennsylvania, 495 F. 2d 1095, 1097 (3rd Cir. 1974). In the *Hoots* case, the district court ordered the Commonwealth and certain other named defendants to prepare and adopt a comprehensive plan of school desegregation for a specific area of Allegheny County. When no appeal was taken by the named defendants from the decision, a local school district filed a petition to intervene in the case as a party defendant. The petition to intervene was filed almost a month after the district court's order was entered. The court of appeals affirmed the lower court's denial of the petition to intervene, holding that "the untimeliness of the various petitions is clear." 495 F. 2d at 1097. While it is true that in the *Hoots* case the petitioners were given a clear warning to intervene and failed to do so, it is undeniable that the petitioners in the instant action were fully aware of the pending litigation and the nature of the relief sought by the plaintiffs but, nonetheless, chose not to exercise their

right to intervene until after the issuance of the injunction *pendente lite* and immediately prior to the entry of the final Order. At that juncture of the case, the application was untimely.

In determining that the application for intervention was untimely filed, the court did not fail to consider the additional factors outlined in the *Hodgson* decision. To allow intervention at this stage of the case would result in serious prejudice to the rights of the plaintiffs and the Philadelphia Fire Department. Extensive discovery has been undertaken and completed, all critical issues have been resolved, and a final Order has been entered. The interest in basic fairness to the parties and the expeditious administration of justice mandates the denial of the motion to intervene. With respect to the question of the necessity of intervention as a means of preserving the applicants' rights, this Court is of the position that the rights of all firemen and officers to promotion within the Fire Department were adequately and fully protected by the City of Philadelphia and the Philadelphia Fire Department throughout the course of this litigation.

Accordingly, the petitioners' motion for leave to intervene in this instant action will be denied.

APPENDIX D.

Purdon's Pennsylvania Statutes.

43 P. S. § 955 Unlawful Discriminatory Practices.

It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification . . . .

(a) For any employer because of the race, color, religious creed, ancestry, age, sex or national origin of any individual and refuse to hire or employ, or to bar or to discharge from employment such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment, if the individual is the best able and most competent to perform the services required . . . .

(b) For any employer, employment agency or labor organization, prior to the employment or admission to membership, to . . . .

(3) Deny or limit, through a quota system, employment or membership because of race, color, religious creed, ancestry, age, sex, national origin or place of birth.

APPENDIX E.

Philadelphia Home Rule Charter,

Section 10-111. Discrimination.

(1) No person shall be appointed or promoted or demoted or dismissed from any position in the civil service, or in any way favored or discriminated against with respect to employment in the civil service because of his race, color, religion, national origin . . . .

(2) No officer or employer and no department, board or commission of the City shall . . . discriminate against any person because of race, color, religion or national origin . . . .

APPENDIX F.

Philadelphia Code, Section 9-1103.

Unlawful Employment Practices.

(a) It shall be an unlawful employment practice:

(1) For any employer to refuse to hire, or discriminate against any person because of race, color, sex, religion, national origin or ancestry with respect to tenure, promotions, terms, conditions or privileges of employment or with respect to any matter directly or indirectly related to employment.

(2) For any employer, employment agency or labor organization to establish, announce or follow a policy of denying or limiting, through a quota system or otherwise, the employment or membership opportunities, of any individual or group because of race, color, sex, religion, national origin or ancestry.

(3) For any employer, employment agency or labor organization prior to employment or admission to membership to:

(a) make any inquiry concerning, or make any record of the race, color, sex, religion, national origin or ancestry of any applicant for employment or membership;

APPENDIX G.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL No. 74-258

COMMONWEALTH OF PENNSYLVANIA, et al.
Plaintiffs

v.

JOSEPH R. RIZZO, et al.
Defendants

Order.

AND NOW, this 27th day of December, 1974, it is hereby ORDERED that the Defendants, in accordance with the attached Memorandum, shall make on December 30, 1974, the following promotions in the Philadelphia Fire Department:

(a) 2 Assistant Chiefs;

(b) 5 Deputy Chiefs, 1 of whom shall be a qualified minority;

(c) 15 Battalion Chiefs, 2 of whom shall be qualified minorities;

(d) 15 Captains, 3 of whom shall be qualified minorities;

(e) 53 Lieutenants, 8 of whom shall be qualified minorities.

Defendants shall make no other promotions until further order of this Court.

LOUIS C. BECHTLE, *J.*

FIRE DEPARTMENT

CITY OF PHILADELPHIA

Memorandum.

Date 12/24/74

To: Steve Arinson, Chief Deputy City Solicitor

From: William McNulty, Personnel Officer—Fire Dept.

Subject: *Anticipated Promotions—12/30/74*

Listed below are the anticipated number of promotions and rank, and numbers on the eligible list to be encompassed effective 12/30/74.

ASSISTANT CHIEF: Two (2) members will be promoted to Assistant Chief, utilizing the first two positions on the list. There are no minorities on this list.

DEPUTY CHIEF: Five (5) members will be promoted to Deputy Chief, utilizing positions 2 through 5 inclusive on the list and adding a minority with position #20 on the eligible list. Total to be promoted—four (4) white, one (1) minority.

BATTALION CHIEF: Fifteen (15) members will be promoted to Battalion Chief, utilizing position 1 through 15 on the eligible list. This includes two minorities—#8 and #12. Total to be promoted—thirteen (13) white, two (2) minority.

CAPTAIN: Fifteen (15) members will be promoted to Captain, utilizing 1 through 11 on the eligible list, and adding #38 and #24 (Charles Lepre and George T. Robinson) and additional minority #32 and #43. Total to be promoted—twelve (12) white, three (3) minority.

LIEUTENANT: Fifty-three firemen will be promoted to Lieutenant, utilizing 1 through 49 on the eligible list (skipping #41) including minority #9, 10 and 21 and adding minority #58, 81, 94, 97 and 117. Total to be promoted—forty-five (45) white, eight (8) minority.

If you require any further information, please feel free to contact me.

/moh

In the Supreme Court of the United States

October Term, 1975
No. 75-1516

FIRE OFFICERS UNION, ET AL.,
Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA, ET AL.,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

---

1. Whether the District Court properly denied the petition to intervene?

2. Whether the Court of Appeals properly denied Petitioners' appeal of the merits because they were not parties below?

STATUTE INVOLVED

Federal Rules of Civil Procedure, Rule 24 (a) (2), Title 28 U.S.C.:

"Rule 24. Intervention

(a) Intervention of Right. Upon Timely Application anyone shall be permitted to intervene in an action: (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

STATEMENT OF THE CASE

The statement of the case presented by Petitioners is based on allegations which are either unsupported or contradicted by the record. The same allegations of fact were made in the Court of Appeals. That court, after careful review of the record, found those allegations to be incorrect (Opinion of the Court of Appeals, Appendix A of the Petition, A. 10-11). Consequently, for the sake of brevity, we adopt the factual statement of the Court of Appeals as outlined in its opinion on pages A-3 through A-7 of Appendix A of the petition.

ARGUMENT

This petition for certiorari involves merely two issues: (a) whether the District Court properly denied the petition to intervene; and (b) whether the Court of Appeals properly dismissed Petitioners' appeal of the merits because they were not parties below. These issues do not warrant review by this Court on certiorari whether viewed individually or in the aggregate. The decisions below were clearly correct and consistent with the recent decisions of this Court; there is no conflict of decision among the circuits; and there are no important questions of Federal law raised by the petition.

I.

Both the District Court and the Court of Appeals, after independently examining the record, found that the applications for intervention were untimely. Only three years ago, this Court in *NAACP v. New York*, 413 U.S. 345, 365-66 (1973), established the standards to be applied in determining whether or not a motion for intervention is timely:

"Whether intervention be claimed of right or as permissive, it is at once apparent, from the initial words of both Rule 24 (a), and Rule 24 (b), that the application must be 'timely.' If it is untimely, intervention must be denied. Thus, the court where the action is pending must first be satisfied as to timeliness. Although the point to which the suit has pro-

gressed is one factor in the determination of timeliness, it is not solely dispositive. Timeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review." (Footnotes omitted.)

The District Court and the Court of Appeals scrupulously followed the standards for timeliness as laid down by this Court. Both courts examined "all the circumstances" including (1) how far the proceedings had gone when the movant sought to intervene, (2) prejudice which resultant delay might cause the other parties, and (c) the reason for the delay. After such review of all the circumstances, *each* court concluded that the intervenors had been adequately represented in the District Court and that the petitions to intervene were untimely.

It is clear that the correct legal principle concerning intervention was followed and that the decisions made by the courts below were in conformity with decisions of other Courts of Appeals and with this Court.[1] Petitioners neither discuss nor even cite *NAACP v. New York, supra,* the leading case on timeliness and the case primarily re-

[1] The citation by the Petitioners to *Trbovich v. United Mine Workers,* 404 U.S. 528 (1972), and *Hodgson v. United Mine Workers,* 473 F.2d 118 (D.C.Cir. 1972), are both inapposite. In each case, the intervention question turned on the adequacy of representation by the Secretary of Labor in an action brought under the Labor Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. §461 *et seq.* Findings of inadequacy of representation were based on the role of the Secretary of Labor vis-a-vis union members under the specific terms of the LMRDA. *See Trbovich,* 538-39.

lied upon by the Court of Appeals. Rather, they merely assert that their version of the facts of adequacy of representation and timeliness is correct, entitling them to intervention as of right.

This is not a sufficient ground upon which to urge review by this Court on certiorari. The Petitioners' version of the facts has been reviewed and rejected by both the District Court and the Court of Appeals. In both courts intervention was denied. Indeed, both courts found that Petitioners' allegations of fact were nowhere supported in the record[2] (Opinion of the Court of Appeals, Appendix A of Petition, A. 10-11; Opinion of the District Court, Appendix C of Petition, C. 60-62). This is not an appropriate case for review by this Court: "The jurisdiction [of the Supreme Court to review cases by way of certiorari] was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing." *Magnum Company v. Coty,* 262 U.S. 159, 163 (1923) (Chief Justice Taft). Certiorari should be denied where, as in the instant case, review is being sought which turns upon an analysis of the particular facts involved, especially where the findings of fact made by the District Court received the unanimous concurrence of the Court

[2] The allegations of fact in the instant petition are identical to those rejected by both the District Court and the Court of Appeals with one exception. That exception is the claim by the Petitioners that they were not allowed to present evidence on the issue of intervention. This is blatantly false and misleading to this Court. The fact of the matter is that the proposed intervenors had every opportunity to but did not submit any evidence in support of their petitions, nor did they even file a pleading. In contradistinction, plaintiffs below submitted evidence in opposition to the petitions to intervene.

of Appeals. This Court has often held that "a court of law, such as this court is, rather than a court for the correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949).

Moreover, another reason militating against this Court's acceptance of this case on certiorari is that the decisions of the District Court and the Court of Appeals on intervention were clearly correct. The first petitions to intervene were filed almost a year after the complaint was filed; five months after relief had been issued with respect to hiring; four months after the issuance of the pretrial order setting a date for the final hearing; after extensive discovery had been conducted and concluded; and after a preliminary injunction had been issued with respect to promotions. Their first attempts to intervene occurred at a critical stage in the litigation. The parties had filed their final pretrial memoranda and exhibits, and the District Court was carefully considering the evidence and the arguments of the parties, and the court was preparing its findings of fact, conclusions of law, and final order. The proposed intervenors admit that they had a long-standing knowledge of this litigation and the only excuse they ever offered for delaying so long in seeking intervention is that they relied on defense counsel's representations that their interests were adequately asserted.

The factual situation in this case was so similar to *NAACP v. New York*, 413 U.S. 345 (1973), that it mandated the Court of Appeals' affirmance of the District Court's ruling herein. The Petitioners' position in this case

is even weaker than the NAACP's. They knew of the litigation and the requested relief from the inception; the case was well publicized; they waited much longer before attempting to intervene; preliminary relief had been granted five months previously; extensive discovery had been held and completed; and the case had reached a critical stage with the District Court preparing its final decision. The Petitioners offer the same meager excuse for their delay—that they were lulled into inaction by representations of defense counsel—although here, unlike in *NAACP v. New York*, there was no evidence presented to support this allegation. Moreover, the Petitioners have never stated that they have new substantive evidence to offer. Thus, the Court of Appeals' decision affirming the District Court's denial of the petition to intervene is clearly consistent with the decisions of this Court.

II.

The second question presented to this Court for review, is even less substantial than the first—whether the Court of Appeals properly dismissed the Petitioners' appeal on the merits on the ground that only a party of record may appeal. The applicable general rule, that only a party of record to the District Court may appeal from its judgment, has long been well established:

> "[I]t has long been the law as settled by this court that 'no person can bring a writ of error [an appeal is not different] to reverse a judgment who is not a party or privy to the record,' Bayard v. Lombard, 9 How. 530, 551 and in Ex parte Tobacco Board of Trade, 222 U.S. 578, it was announced, in

> a per curiam opinion, as a subject no longer open to discussion, that 'one who is not a party to a record and judgment is not entitled to appeal therefrom,' . . ." *United States ex rel. Louisiana v. Jack,* 244 U.S. 397, 402 (1917).

See, Credits Commutation Co. v. United States, 177 U.S. 311 (1900); *Payne v. Niles,* 61 U.S. (20 How.) 291 (1857); 9 J. Moore & B. Ward, Federal Practice, ¶203.06, at 715 (2d ed. 1975).

None of the cases cited in the petition are on point. *Hodgson,* supra, did not involve intervention in the Court of Appeals at all. Both *American B. Shoe and Foundry Company v. Interborough R. T. Company,* 3 F.R.D. 162 (S.D.N.Y. 1942), and *Hurd v. Illinois Bell Tel. Company,* 234 F.2d 942 (7th Cir. 1956), involved cases where one of the parties (representing a class) *took* an appeal but then jeopardized the effective prosecution of that appeal. In those instances, the Court of Appeals allowed other class members to intervene in the ongoing appeal to insure that the class would not be injured by the class representative's lack of faithfulness in prosecuting the appeal. *Auto Workers v. Scofield,* 382 U.S. 205 (1965), held that parties who are wholly successful in unfair labor practice proceedings before the National Labor Relations Board have a right to intervene in the Court of Appeals review proceedings.

III.

Insofar as Petitioners ask this Court to review the final order of the District Court with respect to promotions, that issue is clearly not before this Court; the Court

of Appeals never passed on that contention, having dismissed the Petitioners' appeal of the District Court's orders on the merits on the ground that only a party of record in the District Court may so appeal. If this Court decides that the Petitioners are entitled to intervene, they will have an opportunity to contest the merits in either the District Court or the Court of Appeals.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated: May 19, 1976

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1516

FIRE OFFICERS UNION, *et al.*,
Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Plaintiff-Respondents

AND

JOSEPH R. RIZZO, *et al.*,
Defendant-Respondents

BRIEF FOR DEFENDANT-RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STEPHEN ARINSON
Chief Deputy City Solicitor

SHELDON L. ALBERT
City Solicitor

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1516

FIRE OFFICERS UNION, *et al.*,
Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Plaintiff-Respondents

and

JOSEPH R. RIZZO, *et al.*,
Defendant-Respondents

Brief For Defendant-Respondents in Opposition To Petition For Certiorari

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

QUESTIONS PRESENTED

1. Whether the District Court properly denied the petition to intervene.

2. Whether the Court of Appeals properly denied Petitioners' appeal of the merits because they were not parties below.

STATUTE INVOLVED

Federal Rules of Civil Procedure, Rule 24(a)(2), Title 28 U.S.C.:

"Rule 24. Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

STATEMENT OF THE CASE

Defendant-Respondents adopt the factual statement of the Court of Appeals as set forth in its Opinion at pages A-3 through A-7 of Appendix A of the Petition of Certiorari. However, in restating arguments which were previously made to the Third Circuit Court below, Petitioners have made several misstatements to which Defendant-Respondents feel obliged to respond. In particular Petitioners again claim that it was on December 27, 1974, that they first became aware of the fact that the question of promotions within the Fire Department was being considered by the District Court. Petitioners assert that at that point in the history of this litigation, they concluded that Defendants' counsel "were no longer protecting their [Petitioners'] interest. . . ."

To the contrary, Petitioners were on notice that the issue of promotions, though not addressed at the July, 1974 preliminary injunction hearing, was a major element of the Plaintiff-Respondents' complaint.

As to the averments that Defendants' counsel did not protect Petitioners' interest, this Court should take notice of both the District Court's and the Third Circuit Court's Opinion in this regard. District Court made the following finding, set forth at page 1780 of the Appendix filed with the Third Circuit Court of Appeals:

> "With respect to the question of the necessity of intervention as a means of preserving the applicant's rights, this Court is of the position that the rights of all firemen and officers to promotion within the Fire Department were adequately and fully protected by the City of Philadelphia and the Philadelphia Fire Department throughout the course of this litigation."

On the occasion of the final day of hearing, January 7, 1975, the District Court stated, as set forth at page 1753 of the Appendix for the Third Circuit Court:

> "I would also like to make clear at this time that as far as the Court is concerned, aside from one or two what the Court considered to be minor differences and minor misunderstandings, primarily both sides of this case have advanced their clients' cause with vigor and in the highest keeping of the legal profession as practiced in the United States Courts and that the Court has embodied in its findings several special findings that are intended to make sure there is no misunderstanding as to the Court's attitude in respect to what it believes the performance has been in the past, presently, and expects in the future from both the plaintiff and the City."

Defendants submit that at all times they vigorously and properly represented the interests of the City of Philadelphia, its citizens, the Fire Department, and the employees of the Fire Department.

On hearing the same factual assertions made by Petitioners in their statement of the case in the Petition for Certiorari, the Third Circuit Court of Appeals made an "independent examination of the record" and concluded that the record did not support the contention that Defendants agreed to the injunction *pendente lite* on December 27, 1974, and that the injunction was not a consent decree (Opinion of the Court of Appeals, Appendix A of the Petition, A.10). With respect to Petitioner's claim that Defendants' counsel lulled them into a false belief that the final hearing was to be contested, the Third Circuit Court concluded that, "Examination of the record on this point also renders no support to appellants. There was agreement as to the procedures governing reception of the evidence, but not as to the substantive results of the hearing." (Opinion of the Court of Appeals, Appendix A of the Petition, A.10-11).

This Court should conclude, on the facts of this case as set forth by the Courts below, that no behavior on the part of Defendant-Respondents, or their counsel, in any

way placed petitioners into a position necessitating untimely intervention into this action.

ARGUMENT

Defendant-Respondents, Joseph R. Rizzo, et al., concur in and adopt the arguments of Plaintiff-Respondents, The Commonwealth of Pennsylvania, et al.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Stephen Arinson
Chief Deputy City Solicitor

Sheldon L. Albert
City Solicitor